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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN, JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,
Petitioners,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; MARIO OBLEDO, Secretary, Health and Welfare Agency, State of California; MARION J. WOODS, Director, Department of Benefit Payments, State of California; LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT, as parties to Cooper, et al. v. Obledo, et al.; JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER, BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to Yee-Litt, et al. v. Richardson, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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for the Ninth Circuit

Petitioners, Plumas County Board of Supervisors, *et al.*, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is set forth in Appendix A to this petition. The opinion of the United States District Court for the Eastern District of California is not reported and is set forth in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Department of Health, Education and Welfare (hereinafter HEW) may authorize states to grant Aid to Families with Dependent Children (hereinafter AFDC) on behalf of unborn children on a state optional basis.

2. Whether the Plumas County Board of Supervisors has standing to challenge the federal authorization on a state optional basis of AFDC on behalf of unborn children.

3. Whether dismissal of the Supervisors' challenge to the validity of the California unborn child eligibility regulation, for failure to state a claim upon which relief may be granted, contravened Rule 12(b) of the Federal Rules of Civil Procedure, where both the district court and court of appeals relied on matters outside the pleadings in granting said dismissal.

4. Whether dismissal of the Supervisors' Civil Rights Act claim for relief was erroneous.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Set forth in Appendix C are the pertinent provisions of the first and fourteenth amendments to the United States Constitution; 42 U.S.C. § 1983; the Social Security Act of 1935, 42 U.S.C. §§ 602(a)(1), 1302, and 1304; California Welfare and Institutions Code §§ 10605, 10800, 10801, 11003, 11450(a), and 15150; the federal unborn child eligibility regulation, 45 C.F.R. § 233.90(c)(2)(ii); and the California unborn child eligibility regulation, EAS 44-213.31.

STATEMENT OF THE CASE

On April 16, 1974, the California Supreme Court held in *California Welfare Rights Organization v. Brian,* 11 Cal. 3d 237 (1974), that under federal law, states may elect to treat unborn children as dependent needy children in the AFDC program. *Id.* at 240. Based on this premise, the California court then ordered that an unborn child receive a full food, clothing, and housing allowance and be treated as any other person in computing AFDC assistance. *Id.* at 243.

On March 18, 1975, this Court ruled in *Burns v. Alcala,* 420 U.S. 575 (1975), that an unborn child was not a dependent child for purposes of AFDC and that Congress did not intend that unborn children be eligible for AFDC. *Id.* at 580-81. Rather, the needs of pregnant women were covered by the subsequent title of the Social Security Act, Title V. *Id.* at 583. Despite this Court's ruling, the Secretary of HEW continued to authorize federal financial participation in AFDC payments by several states, including

California, on behalf of unborn children pursuant to HEW regulation 45 C.F.R. § 233.90(c)(2)(ii).

Several months after the California court's decision in *Brian,* the plaintiffs in that case filed an amended complaint against the Secretary of the California Health and Welfare Agency seeking retroactive payments for unborn children. On July 25, 1975, the Sacramento County Superior Court granted the relief sought in a proceeding entitled *Cooper v. Obledo.* The California Welfare Department on September 18, 1975, ordered all counties[1] to compute and pay retroactive grants for unborn children. *Ross v. Superior Court,* 19 Cal. 3d 899, 901-03 (1977). However, the Plumas County Supervisors instructed their county welfare director on November 11, 1975, not to make such retroactive payments. The state welfare director, after telegraphing the Supervisors that he would seek a contempt order, did, together with the plaintiffs in *Cooper v. Obledo,* move the superior court on that case to hold the Supervisors in contempt. On January 23, 1975, each member of the Plumas County Board of Supervisors was adjudged to be guilty of contempt. Each Supervisor was fined $500. *Ross,* 19 Cal. 3d at 903-04. The Supervisors were not parties to the *Cooper v. Obledo* litigation and were not permitted to raise the issue of the legality of AFDC eligibility for

[1]The costs of AFDC in California are shared by the federal, state, and county governments on a ratio of 50% federal, 25% state, and 25% county for administrative costs and 50% federal, 33.75% state, and 16.25% county for cash grant costs. Cal. Welf. & Inst. Code §§ 15151, 15200. In California, AFDC is administered by the counties under state supervision; the County Board of Supervisors is specifically made responsible for administering welfare, including AFDC, pursuant to applicable laws. Cal. Welf. & Inst. Code § 15800.

unborn children at the contempt hearing. Affidavit of Russell H. Papenhausen, R. at 38.

On February 20, 1976, the Plumas County Board of Supervisors and each Supervisor individually instituted this action, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, and 1361; 42 U.S.C. § 1983; and 5 U.S.C. §§ 701-706. The Supervisors further sought a declaration of rights pursuant to 28 U.S.C. §§ 2201 and 2202. Complaint, R. at 1-2.

The Supervisors sought a declaration that HEW regulation 45 C.F.R. § 233.90(c)(2)(ii), which provides federal financial participation in AFDC payments made by states on behalf of unborn children, contravenes 42 U.S.C. § 606(a) and further sought to enjoin the HEW Secretary from providing federal financial participation in such payments and from approving state AFDC plans which provide for AFDC payments on behalf of unborn children. First Amended Complaint, R. at 102. The Supervisors also sought a declaration that California Department of Benefit Payments regulation EAS 44-213.31 which specifies AFDC eligibility for unborn children contravenes 42 U.S.C. § 606(a) and further sought to enjoin the California Secretary of Health and Welfare and the Director of Benefit Payments from requiring AFDC payment on behalf of unborn children. First Amended Complaint, R. at 102-03. The Supervisors also sought a declaration that the defendant state officers, through vexatious, harassing and improper litigation, had engaged in conduct under color of state law designed to result and resulting in the deprivation of rights, privileges,

and immunities secured by the first and fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983. Lastly, the Supervisors sought to enjoin these state officers from subjecting the Supervisors to the deprivation of these constitutionally and statutorily guaranteed rights. First Amended Complaint, R. at 103-04.

In addition to the HEW Secretary and the two state welfare officials, the Supervisors also named as defendants certain individual AFDC recipients who were parties to the contempt actions brought against the Supervisors. R. at 97.

On June 2, 1976, the district court heard cross-motions by defendants to dismiss or alternatively for summary judgment and by the Supervisors for summary judgment. On November 9, 1974, the district court granted the defendant's motion to dismiss. R. at 686. On November 11, 1976, the Supervisors appealed from the dismissal, (R. at 688) and on April 3, 1979, the Ninth Circuit Court of Appeals affirmed the dismissal. Appendix A.

REASONS FOR GRANTING THE WRIT

A. HEW Has No Authority to Authorize States to Provide Optional AFDC Eligibility to Ineligible Categories

In *Burns v. Alcala,* 420 U.S. 575 (1975), this Court held that because the definition of "dependent child" under 42 U.S.C. § 606(a) does not include unborn children, states receiving federal aid under the AFDC program were not required to provide AFDC benefits to unborn children. In so ruling, the Court noted that the respondents in that case did not, and perhaps could not, challenge the HEW policy of allowing states the option of paying AFDC benefits on behalf of unborn children. This Court thus found that it

had no occasion to decide whether HEW had statutory authority to approve federal participation in state programs ancillary to those expressly provided in its Social Security Act or whether HEW is statutorily authorized to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards. *Id.* at 586.

This Court in *Burns* thus left undecided a critically important question of federal law—whether HEW has the authority to expand AFDC eligibility beyond those categories intended by Congress to be eligible for such benefits and to make such eligibility optional with each state. This question is squarely presented by this case. The decision of the California Supreme Court in *California Welfare Rights Organization v. Brian,* 11 Cal. 3d 237 (1974), ruled that "states may elect to treat the unborn as other dependent, needy children in administering their AFDC plans." *Id.* at 240. The California court then ordered that unborn children be treated as dependent children in California and California commenced and continues to do so. California Department of Benefit Payments Regulation EAS 44-213.31, Appendix C at C-8. HEW has approved and continues to approve the California AFDC plan requiring payment of AFDC to unborn children. Court of appeals opinion at 2, Appendix A at A-3. By contrast, this Court noted in *Burns,* 420 U.S. at 579 n.5, that as of 1971, HEW had approved 34 state plans, including Iowa's, that provided no aid to unborn children. Unlike the respondents in *Burns,* the Plumas County Supervisors have throughout this case strongly pressed their challenge to HEW's authorization of extrastatutory and optional eligibility. First Amended

Complaint, R. at 99; Supervisors' Points and Authorities in Support of Motion for Summary Judgment, R. at 507-15; Opening Brief in court of appeals at 10-18.

The court of appeals' tacit approval of HEW's extra-statutory and optional AFDC eligibility for unborn children also creates a substantial conflict with decisions of other circuits. As noted in *Burns,* 420 U.S. at 586, the Second Circuit in *Wisdom v. Norton,* 507 F.2d 750, 756 (2d Cir. 1974), found HEW's policy of allowing payments to unborn children at the option of the participating states to be incorrect. That court noted that if unborn children are eligible under the Social Security Act for AFDC payments, the decisions of this Court prevent states from granting or withholding these payments at their options, since the Act itself does not provide such an option:

> "If, on the other hand, unborn children are not eligible under the Act for AFDC benefits, HEW has no authority to approve said optional payments." *Id.*

In finding unborn benefits to be mandatory, the Eighth Circuit noted in *Alcala v. Burns,* 494 F.2d 743, 746 (8th Cir. 1974), *rev'd,* 420 U.S. 575 (1975):

> "We seriously question the right of HEW, as opposed to the unquestionable right of Congress, to decide what benefits are optional."

To similar effect, the Fifth Circuit found in *Parks v. Harden,* 504 F.2d 861, 872 (5th Cir. 1974), *vacated,* 421 U.S. 926 (1975):

> "And, most importantly, HEW's contention that its regulation authorizes optional payment to 'technically ineligible' recipients cannot withstand close scrutiny. Either unborn children are eligible or they are not. If they are eligible . . . no state may declare expectant mothers and their fetuses ineligible. If this class is *in*eligible, however, then HEW has no power to *allow* the benefits, and in doing so, it has acted *ultra vires*. . . . The Act may not be rigid, but it is *not* so elastic that HEW can stretch its language to cover individuals not intended by Congress to be eligible." (Emphasis in original.)

The decision of the court of appeals in this action permits HEW to continue to authorize federal participation in AFDC payments made at the option of the states to categories not made eligible by Congress. This decision directly conflicts with the decision of the Second, Fifth, and Eighth Circuits in *Wisdom, Parks,* and *Alcala.* For this reason and because HEW authorization of expanded AFDC eligibility at state option is an important question of federal law, which has not been, but should be, settled by this Court, the Supervisors urge that this question is appropriate for review pursuant to Supreme Court Rule 19.

B. The Supervisors Have Standing to Challenge Violations of Federal Law by Federal and State Welfare Authorities

The Social Security Act, 42 U.S.C. § 602(a)(1), authorizes county administration of AFDC. California law specifically places the responsibility for welfare administration upon the County Board of Supervisors. Cal. Welf. & Inst. Code § 10800.

The decision of the court of appeals raises the question whether local government administrators of federal laws have standing to litigate apparent violations of a federal statute which are forced upon them by federal and state

officials. The court of appeals declined to consider this issue even though it was extensively argued by the Supervisors. Opening Brief at 24-33. Instead, the court found that Plumas County would be required to contribute funds to unborn children even if they were not eligible for AFDC; the court therefore held that the Supervisors had suffered no grievance by virtue of the federal regulation and had no standing to challenge it. Slip op. at 3, Appendix A at A-8.

The court of appeals completely ignored the finding of the district court which noted:

> "Plaintiffs, as a Board of Supervisors have refused to make certain retroactive assistance payments with respect to pregnant women in Plumas County because of their belief that such assistance was unlawful. As a result, plaintiffs have been held in contempt in both federal and state courts. Appeals are pending[2] in both the federal and state courts." District court Memorandum of Decision at 8 n.2, Appendix B at B-2.

This Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), found that a local school board had standing to challenge a state law which required it to purchase textbooks and lend them without charge to children in private schools. This Court said in *Allen*:

> "Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be little doubt that appellants thus have a 'personal stake in the outcome' of this litigation. *Baker v. Carr*, 369 U.S. 186, 224, 7 L.Ed.2d 663, 678, 82 S.Ct. 691 (1962)." *Id.* at 241 n.5.

[2]Final judgment in those appeals affirmed the contempt citations. Court of appeals opinion at n.2, Appendix A at A-4.

The Plumas Supervisors have at least as personal a stake in the outcome of this litigation as did the Board of Education in *Allen*. The Supervisors have taken an oath to support the constitution and laws of the United States. Believing the HEW unborn child regulation to be in violation of those laws and the state AFDC regulation to violate the supremacy clause of the Constitution (First Amended Complaint, R. at 100), the Supervisors were put in the position of having to choose between violating their oath and taking a step which would expose them to risk of sanctions. Like the Board in *Allen*, the Supervisors undertook the risk of being expelled from administration of their program. California Welfare and Institutions Code § 10605 authorizes the state welfare director, where he determines a county to be out of compliance with state law or regulations, to withhold part or all of federal funds from the county or to assume direct responsibility for the administration of any or all state-assisted welfare programs in the county. That statute further specifies that during such period of state control, the state director shall not be subject to the authority of the Board of Supervisors. In addition to this risk of sanctions against their official duties, the Supervisors' stake in the outcome was intensely personalized by the actions of the state welfare officials in securing contempt citations and fines against each of the Supervisors. Court of appeals opinion at n.1, Appendix A at A-3. Under these circumstances, the court of appeals' finding that the Supervi-

sors lacked standing to sue directly conflicts with this Court's decision in *Allen.*

The court of appeals' decision is also in conflict with the decisions on this matter of the Second Circuit Court of Appeals. In *Aguayo v. Richardson,* 473 F.2d 1090 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974), the Second Circuit ruled that the City of New York and its commissioners of social services had standing to sue to enjoin both a state welfare program and HEW's approval of the program. Dealing with one of the defendants' challenges to the commissioners' standing, the court noted that he was faced with a conflict between his oath to support the United States Constitution and his duty under state law to carry out state projects. The court then went on to hold that this conflict produced injury sufficient to give the commissioners standing, even though "their pocketbooks were in no way affected." *Id.* at 1100. *Accord, City of New York v. Richardson,* 473 F.2d 923 (2d Cir. 1973), *cert. denied,* 412 U.S. 950 (1973), *retitled on remand Lindsay v. Wyman,* 372 F. Supp. 1360 (1974), *aff'd sub nom. Beame v. Lavine,* 419 U.S. 806 (1974). This ruling conflicts directly with the Ninth Circuit's ruling here that in order to maintain standing, the Supervisors must show a financial loss to the county. Opinion at 3, 7, Appendix A at A-4-A-5, A-8.

Because the court of appeals' decision that standing may be maintained only where there is a financial injury conflicts with the decision of this Court in *Allen* and with those of the Second Circuit in *Aguayo* and *City of New York v. Richardson,* it is respectfully submitted that pursuant to Supreme Court Rule 19, this issue is appropriate for review.

C. Dismissal for Failure to State a Claim upon Which Relief May Be Granted Violates the Federal Rules of Civil Procedure

The court of appeals affirmed the district court's dismissal of the Supervisors' challenge to the validity of the state unborn child AFDC eligibility regulation for failure to state a claim upon which relief may be granted. Federal Rules of Civil Procedure Rule 12(b)(6). The court of appeals based its ruling that the Supervisors lacked standing to sue upon its finding that California's AFDC program exists independent of federal law. Slip op. at 3, Appendix A at A-4-A-5. This finding, in turn, depended upon a strained reading of California Welfare and Institutions Code § 11450 which on its face ties the amount of benefits paid by the state and county in AFDC directly to the amounts paid by the federal government. This section was critical to the Supervisors' argument that the state program was totally dependent upon federal financial participation and that, therefore, a state unborn child program did not exist independent of the AFDC program. The court of appeals found that the dollar figures in Section 11450 no longer have significance because this language refers to a "person count" and since 1965 California has not computed the federal shares by this method. This "person count" theory was submitted to the district court in the form of an affidavit by one Robert A. Horel of the state welfare department. R. at 577. Another affidavit by the same Horel was submitted as Appendix C to the Points and Authorities in Support of Defendants Obledo and Woods' Motion to Dismiss and for Summary Judgment, R. at 441, and was not excluded by the district court.

Federal Rules of Civil Procedure Rule 12(b) requires that when matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment rather than dismissal for failure to state a claim upon which relief can be granted. The district court and court of appeals not only failed to exclude the affidavits of Horel but relied upon them in the adoption of the "person count" theory. Court of appeals opinion at 5, Appendix A at A-6; district court opinion at 8-9, Appendix B at B-8-B9. Affidavits are matters outside the pleadings and under Rule 12(b) require the court to treat the motion as one for summary judgment. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 357 n.4 (1959).

In their eagerness to reach the desired results the courts below assumed not only that the California welfare program was entirely independent of AFDC, but that if federal aid to the unborn were discontinued, the California legislative and executive branches would continue a state only program at twice the cost. In this post-Proposition 13 era, it would be more logical to assume that California would be reluctant to provide such illogical items as separate clothing, housing, and transportation allowances, which are currently factors in the AFDC grant, to unborn children who have no needs separate from their mothers. A summary judgment on these issues would have placed the Supervisors in a position from which they could better contest the merits of such competing assumptions.

In that the court of appeals' affirmation of dismissal for failure to state a claim for which relief can be granted violates Federal Rules of Civil Procedure Rule 12(b) and conflicts with this Court's decision in *Romero,* it is submitted that this issue is appropriate for review pursuant to Supreme Court Rule 19.

D. Dismissal of the Supervisors' Civil Rights Claim for Relief Was Error

In their first amended complaint (R. at 103-04), the Supervisors sought a declaration that the state welfare officials had violated the rights, privileges, and immunities secured to them by the first and fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983, and further sought to enjoin said officials from continuing such violations. This cause of action was based upon the state officials' refusal to grant the Supervisors the administrative due process required by California Welfare and Institutions Code § 10605 prior to taking legal action against them. The Supervisors further charged that the state welfare officials, by unlawful and harassing litigation, were attempting to prevent the Supervisors from peaceably assembling to petition the state government for a redress of grievances concerning the unlawful expenditures of federal, state, and county funds and that the state welfare officials were subjecting the Supervisors under color of state law to a deprivation of rights, privileges, and immunities secured by the first and fourteenth amendments and 42 U.S.C. § 1983. First Amended Complaint, R. at 101-02.

The district court, however, although recognizing that it had jurisdiction to hear this claim, declined to exercise its jurisdiction (Opinion at 12, Appendix B at A-12) and dismissed this claim for relief "by reason of the abstention by the court from entertaining jurisdiction over a matter that should be left to the state courts under principles of comity."

Judgment Dismission Action, Appendix B at B-15. Although the Supervisors pressed this issue on appeal (Supervisors' Opening Brief at 52-63), the court of appeals declined to discuss it in its decision.

While a district court has broad discretion to deny a preliminary injunction, *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), its discretion is much more limited as to dismissal of a claim for relief. On a motion to dismiss on the pleadings, the court must accept the allegations of the complaint and the supporting affidavits as true. *Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967). The Supervisors alleged that the state welfare officials were bringing unlawful and harassing litigation intended to intimidate the Supervisors from peaceably assembling to petition the state government for a redress of grievances (First Amended Complaint, R. at 95) and that the Supervisors had been refused the opportunity to present their federal claims in the state court proceedings. Affidavit of Russell H. Papenhausen, R. at 38-39.

In silently approving the dismissal of this cause of action on the pleadings, the court of appeals' decision conflicts with the decision of this Court in *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), which held:

> "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution."

As the California Supreme Court noted in *Ross v. Superior Court*, 19 Cal. 3d 899, 909 n.7, the Supervisors did not raise their arguments as to the legality of the *Cooper v. Obledo* decision on AFDC payments for unborn children in the contempt action (because they were not permitted to do so by the court) but even if the *Cooper* decision were erroneous, such error under California law would not constitute a defense to a contempt conviction. *Id.* The Supervisors' inability to raise the defense of the merits of unborn child eligibility for AFDC thus brought this case within the confines of *Gerstein*.

This Court further declared in *Juidice v. Vail*, 430 U.S. 327, 338 (1977), that the principle of abstention does not apply in cases where the state proceeding is motivated by a desire to harass or is conducted in bad faith. The Supervisors' first amended complaint specifically charged the state welfare officers with such motivations (R. at 95, 101) and therefore, since under *Gardner v. Toilet Goods Association, supra*, such allegations must be accepted as true, the dismissal conflicts with the rule set forth by this Court in *Gerstein* and *Juidice*.

The court of appeals' refusal to consider the issue of the Civil Rights Act claim dismissal places its decision in conflict with the applicable decisions of this Court and is appropriate for review under Supreme Court Rule 19.

CONCLUSION

The decision of the court of appeals creates an absurd situation where local government officers who attempt to challenge federal and state policies which force them to

administer and expend public funds contrary to law may be dragged through the court, fined, and threatened with imprisonment for their beliefs, and then told that the courts are a one way street. They may be punished for contempt, but they may never be permitted to attempt to justify their actions by having their day in court to prove the illegality of the policies which led to their punishment. The result licenses federal welfare administrators to provide AFDC benefits to statutorily ineligible categories, even where this duplicates coverage provided by Congress in other programs such as the prenatal care provided in Title V of the Social Security Act. In order to provide a check on HEW's extrastatutory expansion of AFDC coverage, it is imperative that local administrators of AFDC be permitted to challenge those programs which conflict with their oath to uphold the Constitution and laws of the United States. For the foregoing reason, the petition for a writ of certiorari should be granted.

June 29, 1979

Respectfully submitted,
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(Appendices Follows)

Appendices

Appendix A

9th Circuit—Opinion

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1280

Plumas County Board of Supervisors and Supervisors Larry Dean, Russell Papenhausen, Joe W. Crivello, Ole Olson and Leonard Ross,

Plaintiffs-Appellants,

vs.

Joseph A. Califano, Jr., Secretary of the Department of Health, Education and Welfare,

Defendant-Appellee.

[Filed April 3, 1979]

On Appeal from the United States District Court
for the Eastern District of California

OPINION

Before: MERRILL and CHOY, Circuit Judges,
and MURRAY,* District Judge

MERRILL, Circuit Judge:

The question presented here is whether Plumas County, California, has standing to challenge the assistance payments it is required to make to pregnant needy women

*Honorable William D. Murray, Senior United States District Judge of the District of Montana, sitting by designation.

under California's program for Aid to Families with Dependent Children (AFDC). The county contends that under federal law unborn children cannot qualify as dependent children, and that the state, receiving federal funding, cannot provide otherwise. Bringing suit through its Board of Supervisors, it seeks injunctive and declaratory relief establishing that it is not legally obligated to make such payments.

Background

Subchapter IV of the Federal Social Security Act, 42 U.S.C. §§ 601, *et seq.* (the Act), authorizes annual appropriations for payments to states that have formulated plans approved by the Secretary of Health, Education and Welfare (HEW) for aid to needy families with children. The manner in which the federal AFDC operates was explained by the Supreme Court in *King v. Smith,* 392 U.S. 309, 316-17 (1968), as follows:

> "The AFDC program is based on a scheme of cooperative federalism * * *. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW) * * *. The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW * * *."

California has elected to participate in the AFDC program. Its plan, the Burton-Miller Act, California Welfare & Institutions Code §§ 11200, *et seq.*, has received the approval of the Secretary. The plan is county administered and state supervised, with the counties acting as agents for the state in making the prescribed payments. *County of Marin v. Martin,* 43 Cal.App.3d 1, 3, 117 Cal. Rptr. 364, 365 (1974). Pursuant to the Act, federal financial participation is available to pay 50 percent of the cost of AFDC grants made under the state plan. Pursuant to California Welfare & Institutions Code § 15200(a), the state pays 67.5 percent of the nonfederal share of the cost, with the county picking up the balance. Thus, where federal assistance is available the cost of making the payments is allocated 50 percent to the federal government, 33.75 percent to the state and 16.25 percent to the county.

For over thirty years HEW, in approving state plans, has allowed states, by regulation, the option of including benefits to pregnant women. 45 C.F.R. § 233.90(c)(2)(ii). HEW does not require such payments, but will match state benefit grants made to pregnant needy women. Plumas County challenges this regulation and practice.[1] It con-

[1]This is not the first time that Plumas County has locked horns with the state over welfare payments. In *California Welfare Rights Organization v. Brian,* 11 Cal.3d 237, *cert. denied,* 419 U.S. 1022 (1974), and *Cooper v. Swoap,* 11 Cal.3d 856 (1974), the California Supreme Court held certain state welfare regulations invalid and incompatible with governing statutory provisions. This was followed by a class action brought by would-be welfare recipients, *Cooper v. Obledo,* in California superior court, seeking payment of benefits improperly withheld under the invalid regulation. In that case the superior court held that the plaintiffs were entitled to recover sums improperly withheld, and directed the state Department of Benefit Payments to notify all county welfare departments to that effect. The state department then ordered the counties to

tends that the federal regulation is invalid, since it is contrary to the Social Security Act. It contends that the validity of the state plan, by statute or regulation, is dependent upon the lawful continuation of federal matching funds and that if the federal regulation is held invalid the state plan for unborn children will fall with it.[2]

The district court rendered judgment for appellee. It held, first, that California's AFDC statutory and regulatory provisions required payment to needy pregnant women independent of federal law, placing a responsibility upon the county without regard to the existence of federal matching funds; second, that since the county's duty to contribute under state law existed independently, the supervisors had suffered no grievance by virtue of the

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compute and pay the retroactive welfare grants. When Plumas County's Board of Supervisors was informed of the order the Board instructed the county welfare director not to make the payments and resolved "that Plumas County not comply with the court order, as this would be an unanticipated expense for which no county funds are available."

On motion filed by the state department the court ordered the supervisors held in contempt, finding that there was "actual notice, wilful refusal to abide by the judgment and ability to comply." The court postponed sentencing for two weeks to allow for a change of heart. At sentencing, the supervisors adhered to their position and each was fined $500. The judgment was affirmed by the California Supreme Court in *Ross v. Superior Court*, 19 Cal.2d 899, 141 Cal. Rptr. 133 (1977).

[2]Also named as parties defendant in appellants' third claim were eight individuals who were prevailing plaintiffs in *Cooper v. Obledo; see* note 1. By this claim, appellants sought to enjoin state officials from continuing to prosecute civil contempt actions against them. The district court abstained from reaching this claim, noting that it was already the subject of state and federal actions. Final judgment has now been rendered in those actions affirming the contempt judgments. *Ross v. Superior Court, supra* note 1, *Yee-Lit v. Richardson*, Unpublished Memorandum No. 76-1455 (9th Cir. Aug. 28, 1978). Thus, this claim of appellants has already been adjudicated and is now precluded by res judicata.

federal regulation and had no standing to challenge it. We agree.

State Law

In *California Welfare Rights Organization v. Brian, supra* note 1, 11 Cal.3d 237, 113 Cal.Rptr. 154, *cert. denied*, 419 U.S. 1022 (1974), the California Supreme Court, in invalidating a state regulation reducing aid to the unborn, took note of the option offered by HEW respecting pregnant women. The court noted that since 1949 California law has included unborn children in its AFDC plan. The court treated the regulation providing for payment to the unborn, California Regulation EAS 44-213.31, as having been approved by the legislature in the absence of any contrary intent. 11 Cal.3d at 241.

One year later, in *Burns v. Alcala*, 420 U.S. 575 (1975), the Supreme Court held that an unborn child is not a "dependent child" as defined in the Social Security Act, 42 U.S.C. § 606(a), and that a state cannot be required to provide benefits to pregnant women in order to qualify for federal matching funds.

In *Ross v. Superior Court*, 19 Cal.3d 899, 141 Cal.Rptr. 133 (1977) *supra* note 1, the California Supreme Court made it clear that *Burns* had no effect upon the state law as set forth in *Brian*. The court stated:

> "[O]ur *Brian* decision was explicitly based on our interpretation of California's statutory welfare scheme (see 11 Cal.3d at pp. 240-241, 113 Cal.Rptr. 154, 520 P.2d 970) and thus is not affected by the Supreme Court's subsequent interpretation of federal legislation in *Burns*."

19 Cal.3d at 909 n. 7.

Appellants point to California Welfare & Institutions Code § 11450, which specifies county obligation for AFDC and provides in part:

> "If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above table shall be increased or decreased by an amount equal to such increase or decrease by the United States government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453."

Under this section, it is contended, if federal payments cease the county's obligation ceases as well. That section, however, has reference to computation of the federal contribution by a "person count," totalling the compensation paid to each recipient. Since 1965 California has not computed the federal share by this method. Instead, it computes the federal share on the basis of an aggregate 50 percent of the total cost to the state. *See* 42 U.S.C. § 1318. Thus, the federal and county dollar-per-person figures set forth in § 11450 no longer have significance.

We agree with the district court in its construction of California state law to the effect that Plumas County's obligations under present state law exist independently of federal funding. The existence of this independent obligation does not act to invalidate the state program by creating a conflict with federal law. A state plan is in conflict with the Act when it does not incorporate the *minimum* requirements of 42 U.S.C. § 602. *See* 42 U.S.C. § 604. *Cf. Carleson v. Remillard,* 406 U.S. 598 (1972), *Townsend v. Swank,* 404 U.S. 282 (1971), *King v. Smith, supra.*

Federal Law

The Social Security Act, as we have noted, does not place any obligation on any state or any county to come forward with a suitable AFDC program, or to make payments under such program. It leaves the decision to the state and offers federal funds for the aid of those states that have established programs approved by the Secretary.

Plumas County attacks the federal regulation granting federal funds to reimburse states for payments to pregnant mothers, contending that the regulation is contrary to the terms of the Act as construed by the Supreme Court in *Burns v. Alcala, supra.* Apparently its belief is that regardless of California law, from a practical perspective the existence of the state program is dependent upon the continuation of federal funding, and that if the federal regulation should be held invalid the state program would necessarily terminate.

The validity of the federal regulation allowing matching funds on behalf of pregnant women was a question explicitly reserved by the Supreme Court in *Burns.* The Court noted that HEW did not construe the Act's definition of dependent child to include an unborn child, but rather construed 42 U.S.C. § 1302 as authorizing it "to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards." 420 U.S. at 586. The Court reserved the question of HEW's authority, stating: "We * * * have no occasion to decide [the question]." *Id.*

The district court also found no occasion to decide the question. It stated:

> "[I]f Plumas County has a State-imposed obligation to pay assistance to pregnant needy women (through its Board of Supervisors), even in the absence of Federal financial participation in such assistance, plaintiffs have not been injured or affected by any provision of Federal regulations in a way which invalidation of those regulations will redress."

It quoted the Supreme Court in *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976), to the following effect:

> "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the [Constitution's] Art. III limitation." (Footnote omitted.)

The only effect invalidation of the HEW regulation respecting unborn children could have on Plumas County or its supervisors would be to deprive the county of federal assistance in meeting its state-created obligation and thus double the amount of the contribution it is obliged to make. We agree with the district court that Plumas County cannot claim to be aggrieved by the receipt of federal assistance respecting state-created obligations to needy pregnant women.

Nor can the supervisors, as federal taxpayers, claim standing to challenge the federal expenditure. In *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923), the Court stated that one challenging the validity of a statute "must

be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Appellants protest that if they have no standing to question the federal regulation, that regulation is substantially immune from judicial scrutiny.[3] However, few citizens other than in their status as taxpayers, can ever claim to be aggrieved by governmental generosity. In *Mease v. Heinz,* ..... F.Supp. ..... (E.D.Penn. 1978), the court discussed the question of a taxpayer's standing to protest the action of the government in giving away the Panama Canal. Finding no standing, it stated:

> "The plaintiffs' objection that this rule leads to the result that certain actions simply cannot be challenged in federal court is well taken. However, Chief Justice Burger answered this argument in *Schlesinger* [*v. Reservists to Stop the War,* 418 U.S. 208, 227 (1974)] by observing that our system of government leaves many decisions to the political process."

Judgment affirmed.

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[3]The question has received judicial attention, however. In *Wisdom v. Norton,* 507 F.2d 750, 756 (2d Cir. 1974), the court, anticipating *Burns,* held that the State of Connecticut could not be required to provide funds for pregnant women since an unborn child was not a dependent child under the Social Security Act. The court went further, however, and ruled that in issuing the regulation HEW exceeded its authority. In reserving this question the Supreme Court, in *Burns,* took note of this holding. 420 U.S. at 586.

Appendix B

ED Cal. Opinion
Judgment Dismissing Action

In the United States District Court
For the Eastern District of California

Civil Action No. CV/S-76-111-TJM

Plumas County Board of Supervisors and Supervisors Larry Dean, Russell Papenhausen, Joe W. Crivello, Ole Olsen and Leonard Ross,

Plaintiffs,

vs.

F. David Mathews, Secretary of United States Department of Health, Education and Welfare; Mario Obledo, Secretary, Health and Welfare Agency, State of California; Marion J. Woods, Director, Department of Benefit Payments, State of California; Laura Cooper, Hazel Wilks and Ottilia Lott, as parties to Cooper, et al. v. Obledo, et al.; Joyce Yee-Litt, Theodore Parsons, Lena Olivier, Beverly O'Campo, and Ruben O'Campo, as parties to Yee-Litt, et al. v. Richardson, et al.

Defendants.

[Filed Nov. 5, 1976]

MEMORANDUM AND DECISION
DISMISSING ACTION

This action was brought by the Board of Supervisors of Plumas County, and by its members as individuals, to chal-

lenge the validity of a regulation issued by the Department of Health, Education, and Welfare, appearing at 45 C.F.R. § 233.90(c)(2)(ii).[1] This regulation makes Federal financial participation under the Social Security Act, Title IV(a), 42 U.S.C. 601 et seq., available in assistance payments with respect to pregnant needy women by reason of such pregnancy in those states which elect to provide these payments under an approved plan of Aid to Families with Dependent Children (AFDC). The defendants are F. David Mathews, Secretary of the United States Department of Health, Education, and Welfare; Mario Obledo, Secretary, Health and Welfare Agency, State of California; Marion J. Woods, Director of Benefit Payments, State of California; Laura Cooper, Hazel Wilks and Ottilia Lott, as parties to *Cooper, et al. v. Obledo, et al. v. Obledo, et al.* [sic] Sacramento Superior Court No. 219145, sub nom *Ross v. Superior Court,* Court of Appeal of California, Third Appellate District, No. CIV. 15804 and Joyce Yee-Litt, Theodore Parsons, Lena Olivier, Beverly O'Campo, and Ruben O'Campo, as parties to *Yee-Litt, et al. v. Richardson, et al.* (N.D. Cal.) No. C-71-2286 OJC, sub nom *Yee-Litt* v. *Richardson,* Court of Appeals, 9th District Circuit, No. C-76-1455. Plaintiffs have been subjects of contempt orders in these two cases.[2]

[1] 45 C.F.R. § 233.90(c)(2)(ii) states:

> (2) Federal financial participation is available in: (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis.

[2] Plaintiffs, as a Board of Supervisors have refused to make certain retroactive assistance payments with respect to pregnant needy women in Plumas County because of their belief that such assistance was unlawful. As a result, plaintiffs have been found in contempt in both federal and state courts. Appeals are pending in both the federal and state courts.

This case is before the court on cross-motions (1) by the federal defendant, F. David Mathews, to dismiss or alternatively for summary judgment, (2) by the State defendants, Mario Obledo and Marion J. Woods, to dismiss or alternatively for summary judgment, (3) by the defendants Laura Cooper, Hazel Wilks, and Ottilia Lott to dismiss, and (4) by the plaintiffs for summary judgment. A hearing was held on these motions on June 2, 1976.

Plaintiffs seek to invoke this court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 1361, 42 U.S.C. § 1983, and 5 U.S.C. §§ 701-706. In addition, plaintiffs seek a declaration of rights under 28 U.S.C. §§ 2201-2202.

Plaintiffs purport to state three claims for relief. The first challenges the validity of the federal regulation at 45 C.F.R. § 233.90(c)(2)(ii), asserting that it is inconsistent with title IV-A of the Social Security Act, 42 U.S.C. § 601 *et seq.*

Plaintiffs' second claim attacks the validity of the State of California's regulation, EAS 44-213.31,[3] which provides, *inter alia,* for aid to pregnant needy women by virtue of that pregnancy under California's Burton-Miller Act welfare program, § 11200 *et seq.*[4] Plaintiffs contend that this provision contravenes section 406(a) of the Social Security

[3] State Department of Benefit Payments Regulation EAS 44-213.31 in part reads as follows:

> .3 *Needy persons Living in the Home Who Shall be Included As "Recipients" In The Same Family Unit, Unless EXCLUDED By Section* 44-213.5
>
> .31 *Children*—All related eligible unmarried children, including the unborn child, for whom aid is requested by the child's parent or caretaker relative.

[4] All citations are to the California Welfare and Institutions Code, unless otherwise noted.

Act, 42 U.S.C. § 606(a). The Burton-Miller Act serves as the basis for California's State plan for AFDC (Title IV-A of the Social Security Act). The parties, however, dispute the question of whether the State's Burton-Miller Act, in addition to satisfying the Federal requirements for financial participation, would continue in operation as an independent State welfare program as a question of State law if the federal sharing of costs should be discontinued. They also disagree as to whether State regulation EAS 44-213.31, *supra*, violates the federal Social Security Act and State law.

Plaintiffs' third claim challenges the State defendants' use of federal and State court contempt proceedings against them without first having followed the administrative procedures provided by the Miller-Burton Act. § 10605. These contempt proceedings allegedly deprive plaintiffs of their rights to peaceably assemble, to petition the State Government for a redress of grievances, and deprives them of rights, privileges and immunities secured to them by the Constitution of the United States, first and fourteenth Amendments, and by 42 U.S.C. § 1983.

Defendants have challenged the jurisdiction of this Court on the ground that plaintiffs have no standing to sue, that no claim is stated against defendants upon which relief can be granted, and that the Court should not exercise its discretionary equitable jurisdiction. Central to the sufficiency of the plaintiffs' first and second claims for relief is defendants' assertion that the State's Burton-Miller Act imposes an independent obligation upon plaintiffs to provide welfare to pregnant needy women and that this obligation

is operative even if federal sharing of costs is not available. Defendants also argue that State law, by providing welfare benefits in addition to those authorized by the federal Social Security Act, does not thereby violate the federal statute.

SECOND CLAIM FOR RELIEF

The dictates of logic require that the plaintiffs' second claim for relief be considered out of numerical order. The issue of whether California's Miller-Burton Act is operative even without the sharing of costs by the federal government under the Social Security Act is crucial to the ascertainment whether plaintiffs' first claim for relief states a claim against defendants upon which relief can be granted. For if Plumas County has a State-imposed obligation to pay assistance to pregnant needy women (through its Board of Supervisors), even in the absence of Federal financial participation in such assistance, plaintiffs have not been injured or affected by any provision of Federal regulations in a way which invalidation of those regulations will redress. The applicable principle of law was clearly articulated by the Supreme Court in *Eastern Kentucky Welfare Rights Organization* v. *Simon*, ... U.S. ....., 44 U.S.L.W. 4724 (June 1, 1976). Speaking for the Court, Mr. Justice Powell stated:

> "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus incon-

sistent with the [Constitution's] Art. III limitation. *Id.* at 4728." (Footnote omitted.)

With respect to the plaintiff's second claim for relief, they do not deny that the State of California could adopt a program of aid to pregnant needy women, independent of the Federal AFDC program. Plaintiffs only maintain that the Burton-Miller Act is not such an independent program.

This Court does not agree with plaintiff's conclusion on this question. For the reasons set forth below, the Court finds that California does have a program of providing aid to pregnant needy women which is independent in its implementation of the federal Title IV Social Security Act Program.

In reaching its conclusion on the matter of State law, this Court is quite mindful of the deference which must be accorded the State courts in such determinations. As stated in *Chavez v. Dickson,* 280 F.2d 727, 731 (9th Cir. 1969), cert. *denied* 364 U.S. 934 (1961),

> "Federal courts are bound by the interpretation placed upon the statute of a state by its highest court. [citing] State of Minnesota ex rel *Pearson v. Probate Court of Ramsey County,* 309 U.S. 270, 273; *Daloia v. Rhay,* 9 Cir., 252 F.2d 768, 771; *Duffy v. Wells,* 9 Cir., 201 F.2d 503, 505."
>
> Accord *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974).

The question of the independence of California's Burton-Miller Act should be considered in the light of the decision of the Supreme Court of California in *California Welfare Rights Organization (C.W.R.O.) v. Brian,* 11 Cal.3d 237

(1974). In determining that *C.W.R.O., supra,* is controlling, the Court notes that the California Legislature has not changed the construction of the California statute made in that case, nor has the Legislature asserted the dependence of the State program on federal AFDC funding.

Although the issue in *C.W.R.O., supra,* was whether the pregnant woman could be considered a resource to the fetus (and the grant to the unborn child reduced accordingly), the determination by the California Supreme Court that the unborn child should be considered a separate person for cash grant computation purposes under the applicable California statutes is relevant to this action. In tracing the origin of the unborn children aid program in California, the Court noted:

> "The Department's [Social Welfare now Benefit Payments] long-standing administrative practice of providing aid to, or on behalf of, the unborn child may, in the absence of any legislative intent to the contrary, be deemed approved by the Legislature and *representative of existing state law. Id.* at 241. (Emphasis added.)"

Thus, this Court finds that Miller-Burton assistance must be paid by the California counties to pregnant needy women under California law as construed in C.W.R.O., *supra.*

Plaintiffs argue that notwithstanding *C.W.R.O., supra,* this Court should find that the Miller-Burton Act is dependent upon the payment of federal financial assistance under the Social Security Act. The Court, however, disagrees.

Section 11207 of the Welfare and Institutions Code imposes upon the counties an obligation to pay cash grants

to those eligible under the Miller-Burton Act. That Section in part provides:

> "Every county shall grant aid to any child eligible therefore, in any amount needed, not to exceed the amount specified in Section 11450. . . ." [5]

Section 11450 contains, *inter alia*, a table of cash grants for families of various sizes. ("Aid" in § 11450 means financial assistance including direct money payments. § 10052). The operation of these statutes is independent of federal law. Cf. *Tripp v. Swoap*, 17 Cal.3d 671, 684-85 (1976).

Plaintiffs rely heavily upon section 11450 which also contains a provision which reads as follows:

> "If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above table shall be increased or decreased by an amount equal to such increase or decrease by the United States government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453."

In the context of the relevant federal statutes, the Court finds that this language is consistent with the findings that the operation of the California Miller-Burton Act is independent upon the federal AFDC statute.

The State defendants have called the Court's attention to the fact that California since 1965 has not computed the federal share of cost of its AFDC assistance by the "person count" method prescribed in 42 U.S.C. section 603 and

[5] Under *C.W.R.O., supra*, the unborn is deemed a child within section 11207.

the quoted language from section 11450. Rather, California in 1965 enacted its Social Security Act, Title XIX medical assistance program (Stats. 1965, 2nd ex. sess., ch. 4 and opted to have the federal share of cost computed on an aggregate fifty percent of "expenditure" basis as provided in 42 U.S.C. § 1308.) Because the current fifty percent cost sharing is not calculated by formula on a "person count" basis the federal dollar figure per person paid on July 1, 1972, cannot be compared to the aggregate "expenditure" method of computing the federal share of cost used in each fiscal year since 1965. It can be inferred that the California Legislature has decided not to repeal this paragraph (although it is currently not operative), because the State in the future may find it advantageous to return to the "person count" formula in computing the federal share of cost provided in 52 U.S.C. § 603. The paragraph in question would thereupon become operative.

The State defendants contend that because California has elected to use the aggregate fifty percent method, the reduction specified in section 11450 does not apply. Because California has adopted the 42 U.S.C. § 1308 "expenditure" method, it is not possible to compare accurately federal cost sharing currently paid with the "person count" formula used on July 11, 1972. Accordingly, the county's obligation to pay its share of Miller-Burton aid to the unborn under sections 11207 and 15200 is not affected by section 11450. This county obligation continued in effect even if the State Director of Benefits takes the procedural steps specified in section 10605(b) to supercede the county administration of public assistance with State administration. The county ob-

ligation to make payment continues in effect under section 10605(c)(2nd par.).[6]

Further, State law provides that this county obligation to pay aid continued independently of federal funding. The State reimburses the counties "after deducting federal funds available. . . ." If no federal funding is available, the State reimburses the county at the rate of 67.5% of the sums paid out as aid. Section 15200. There is no provision in the federal Social Security Act which forbids a State from establishing an independent state, or locally financed, welfare program. The State's county general relief program is an example. Welfare and Institutions Code, sections 1700 *et seq.* The Court therefore finds that the existence of the State's Miller-Burton Act as an independent state welfare program is not inconsistent with the federal Social Security Act.

However, the net effect of a cutoff of federal matching funds for California's aid to the unborn children program would be an increase in the dollar cost of the Miller-Burton program to the counties. Plaintiffs, therefore, are benefited by the federal regulation which permits the federal matching for such program.

Therefore, this Court hereby dismisses the second claim for relief for failure to state a claim against defendants upon which relief can be granted, without prejudice to

[6]"Nothing in this section [10605] shall be construed as relieving the Board of Supervisors of the responsibility to provide funds necessary for the continued aid required by law." Section 10605(c) (2nd par.).

plaintiffs' right to relitigate this claim for relief in the State courts or to relitigate this issue in the federal courts should (1) there be a legislative enactment by the California Legislature or (2) a subsequent holding by the California courts, that the Miller-Burton Act is inoperative unless its expenditures are shared by the federal government under the provisions of the federal Social Security Act.

FIRST CLAIM FOR RELIEF

The Court has heretofore found that the State's Miller-Burton Act imposes an obligation on plaintiffs to pay welfare to pregnant needy women independent of the existence of federal share of costs. It follows that plaintiffs are neither injured nor affected by the federal regulation in question and have suffered no grievance thereby, since their obligation to pay welfare would continue in effect under State law even if the federal regulation became for any reason inoperative.

The only injury plaintiffs could assert would be the same as any federal taxpayer. Plaintiffs have not asserted that they have standing as taxpayers, nor could they, in view of the speculative and ephemeral interests involved. *Frothingham v. Mellon,* 262 U.S. 447 (1923), *United States v. Richardson,* 418 U.S. 166 (1974); *Warth v. Seldon,* 422 U.S. 480 (1975). The Court, therefore, dismissed the first claim for relief for the lack of plaintiffs' standing to litigate the claim therein raised.

THIRD CLAIM FOR RELIEF

Upon examination of the plaintiffs complaint, the Court notes that plaintiffs are the Board of Supervisors, County of Plumas, State of California, and the five elected members of such Board. By virtue of the pleading of these facts, the Court finds that it has jurisdiction to hear the third claim for relief under 28 U.S.C. 1331 and 1343.

However, this Court declines to exercise its discretionary equitable jurisdiction since plaintiffs are not threatened by irreparable injury and have an adequate opportunity to present their federal question defenses in their pending appeal to the Court of Appeals for the Ninth Circuit and in their Petition for Writ of Certiorari in the appellate courts of California. The principle of comity is applicable here to reinforce this deference in the case of pending State quasi-criminal contempt proceedings. *Huffman v. Pursue,* 420 U.S. 592, 599-613 (1975); *Younger v. Harris,* 401 U.S. 37, 43-54 (1971); *In re Coleman,* 12 Cal.3d 568, 572 (1974). Plaintiffs' third claim for relief accordingly will be denied.

Judgment therefore will be entered which dismisses each of the plaintiffs' first and second claims for relief as set out in their Complaint, which denies their third claim for relief and which awards defendants their costs. This disposition of the first two claims for relief by dismissal, and the refusal of the Court to exercise its discretionary jurisdiction by denying the third claim for relief renders it unnecessary for the Court to decide the remaining substantive

and procedural issues on those claims raised by the record and briefed by the parties. I.e. *Burns v. Alcala,* 420 U.S. 575, 586 (1974).

Order accordingly.

DATED: November 3, 1976.

/s/ William P. Gray
WILLIAM P. GRAY
Judge of the United States District Court

Approved for form

.....

DATED: ....., 1976

Civil Action
CV S-76-111

United States District Court
Eastern District of California

Civil No. S-76-111-WPG

Plumas County Board of Supervisors and Supervisors Larry Dean, Russell Papenhausen, Joe W. Crivello, Ole Olsen and Leonard Ross,

Plaintiffs,

vs.

F. David Mathews, Secretary of United States Department of Health, Education and Welfare, et al.,

Defendants.

[Filed Nov. 5, 1976]

JUDGMENT DISMISSING ACTION

The defendants' motions for dismissal of this action and the plaintiffs' motion for summary judgment came on for hearing on June 2, 1976. For reasons set forth in a Memorandum of Decision (submitted by the Attorney General of California on behalf of the state defendants, and modified by the Court) that is filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. The first claim for relief is dismissed for lack of plaintiffs' standing to litigate such claim.

2. The second claim for relief is dismissed for failure to state a claim upon which relief can be granted. This dismissal is without prejudice to the plaintiffs' right to

relitigate this claim under circumstances set out in the Memorandum of Decision.

3. The third claim for relief is dismissed by reason of the abstention by the court from entertaining jurisdiction over a matter that should be left to the state courts under principles of comity.

Dated: November 3, 1976.

WILLIAM P. GRAY
William P. Gray
United States District Judge

Appendix C

First and Fourteenth Amendments

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 602(a)(1)

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; . . .

42 U.S.C. § 1302

§ 1302. Rules and regulations

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

42 U.S.C. § 1304

§ 1304. Reservation of right to amend or repeal

The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress.

California Welfare and Institutions Code § 10605

§ 10605. Notice of noncompliance; order to show cause; findings and decisions; sanctions

If the director considers a county director to be failing, in a substantial manner, to comply with any provision of this code or any regulation, pertaining to the administration of public social services, except health care services and medical assistance, the director shall put the county director on written notice to that effect, and shall give a copy of the notice to the board of supervisors.

If within 60 days the county director fails to give reasonable assurance that he is complying and will continue to comply with the laws and regulations, the director shall order the county to appear at a hearing, before the director, with the State Social Services Advisory Board, to show cause why the director should not take action to secure compliance. The county shall be given at least 30 days' notice of such hearing. The director shall consider the case on the record established at the hearing, and the advice of the State Social Services Advisory Board, and, within 30 days, shall render proposed findings and a proposed decision on the issues. The proposed findings and decision shall be submitted to the county, and the county shall have an opportunity to appear within 10 days at such time and place as may be fixed by the director, for the purpose of presenting oral arguments respecting the proposed findings and decision. Thereupon the director shall make his final findings and decision.

If the director determines that there is a failure on the part of the county to comply with the provisions of this code or the established regulations, or if the State Personnel Board certifies to the director that a county is not in conformity with established merit system standards under Part 2.5 (commencing with Section 19800) of Division 5 of Title 2 of the Government Code, and that administrative sanctions are necessary to secure compliance, the director may invoke any of the following sanctions:

(a) Withhold part or all of state and federal funds from such county until the county shall make a showing to the director of compliance; or

(b) Assume, temporarily, direct responsibility for the administration of any or all state-assisted public social

service programs in such county, except health care services and medical assistance, until the county shall provide reasonable assurance to the director of its intention and ability to comply with such laws and regulations. During such period of state administrative responsibility for county programs, the director or his authorized representative shall have all of the powers and responsibilities of the county director, with the exception that he shall not be subject to the authority of the board of supervisors; or

(c) Bring an action in mandamus or such other action in court as may be appropriate to compel compliance. Any such action shall be entitled to a preference in setting a date for a hearing.

Nothing in this section shall be construed as relieving the board of supervisors of the responsibility to provide funds necessary for the continued public social services required by law.

Nothing contained in this section shall be construed as preventing a county from seeking judicial review of action taken by the director pursuant to this section under Section 1094.5 of the Code of Civil Procedure or, except in cases arising under Sections 10962 and 10963, from seeking injunctive relief when deemed appropriate.

California Welfare and Institutions Code § 10800

§ 10800. Administration as county function; establishment of county department

Subject to the provisions of Section 11050 and Chapter 3 (commencing with Section 12000) of Part 3, the administration of public social services in each of the several counties of the state is hereby declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties pursuant to the applicable laws, and in the case of public social services for which federal or state funds are provided, subject to the regulations of the department and the State Department of Health Services.

For the purpose of providing for and carrying out this function and responsibility, the board of supervisors of each county, or other agency as may be otherwise provided by county charter, shall establish a county department, unless otherwise provided by the county charter. Except as provided herein, the county department shall be the county agency for the administration of public social services and for the promotion of public understanding of the public social services provided under this code and the problems with which they deal.

California Welfare and Institutions Code § 10801

§ 10801. County director.

A county director shall be appointed in each county by the board of supervisors or other agency designated by county charter, subject to either local merit system standards or to standards prescribed under the merit system administered by the State Personnel Board.

The county director shall at all times be under the general direction and supervision of the board of supervisors, unless otherwise provided by county charter.

California Welfare and Institutions Code § 11003

§ 11003. Conformity to federal requirements; inoperative sections

If the United States Department of Health, Education, and Welfare issues a formal ruling that any section of this code relating to public assistance cannot be given effect without causing this state's plan to be out of conformity with federal requirements, the section shall become inoperative to the extent that it is not in conformity with federal requirements.

California Welfare and Institutions Code § 11450(a)

§ 11450. Amounts payable; foster care

(a) For each needy family which includes one or more needy children qualified for aid under this chapter, except as provided in Section 11403, there shall be paid, notwithstanding minimum basic standards of adequate care established by the department under Section 11452, an amount of aid each month which when added to his income, exclusive of any amounts considered exempt as income or paid pursuant to subdivision (d) of this section or Section 11453.1, is equal to the sums specified in the following table, as adjusted for cost-of-living increases or decreases pursuant to Section 11453:

Number of eligible needy persons in the same home	Maximum aid
1	$166
2	273
3	338
4	402
5	459
6	516
7	566
8	616
9	666
10 or more	716

If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above table shall be increased or decreased by an amount equal to such increase or decrease by the United States government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453.

• • • • •

The amounts payable to recipients pursuant to Section 11453.1 shall not constitute income to recipients of aid under this section.

California Welfare and Institutions Code § 15150

§ 15150. Payment of federal funds to counties

During such time as grants-in-aid are provided or made available by the United States government for public assistance in this state, the State Treasurer shall pay to each county from the sums so granted (1) an amount which shall be used exclusively as public assistance equal to the full amount of any sums received from the United States government as public assistance in respect to recipients within the provisions of this chapter maintained or supported by the county; and (2) an additional amount equal to such county's proportionate share of any amount so granted or made available to this state by the United States government for the costs of administering such aid, which additional amount shall be used exclusively for paying such administration costs. The department shall determine the portion of the amount so granted or made available for

administration costs to be paid to the counties, which portion for each county shall bear the same proportion to the total amount made available to this state for such administrative costs that the administrative costs of that county bear to the total administrative costs of all counties and of the state. The department shall adopt rules and regulations which shall be of uniform application for determining the proportionate shares for such quarter to each county under the provisions of this section and Section 15152.

45 C.F.R. § 233.90(c)(2)(ii)

(2) Federal financial participation is available in:

* * * *

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

California Department of Benefit Payments

Regulation EAS 44-213.3

.3 *Needy persons living in the home to be included as "recipients" in the same family budget unit, unless EXCLUDED by Section 44-213.5.*

.31 *Children*—All related eligible unmarried children (never married or not presently married by reason of annulment, dissolution, divorce, or death of the spouse), including the unborn child, for whom aid is requested by the child's parent or relative caretaker.

Supreme Court, U. S.
FILED
JUL 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN, JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,

Petitioners,

v.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; MARIO OBLEDO, Secretary, Health and Welfare Agency, State of California; MARION J. WOODS, Director, Department of Benefit Payments, State of California; LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT, as parties to Cooper, *et al.* v. Obledo, *et al.*; JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER, BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to Yee-Litt, *et al.* v. Richardson, *et al.*,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN, JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,

Petitioners,

v.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; MARIO OBLEDO, Secretary, Health and Welfare Agency, State of California; MARION J. WOODS, Director, Department of Benefit Payments, State of California; LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT, as parties to Cooper, *et al.* v. Obledo, *et al.*; JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER, BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to Yee-Litt, *et al.* v. Richardson, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. A of Petition) is now reported at 594 F.2d 756.

QUESTIONS PRESENTED

1. Whether the Plumas County Board of Supervisors has standing to challenge federal financial participation in optional state payments for families with unborn children under the Aid to Families with Dependent Children (AFDC) program?

2. Whether the United States Department of Health, Education and Welfare may authorize states to grant AFDC on behalf of unborn children on an optional basis?

3. Whether the District Court and Court of Appeals improperly relied on matters outside the pleadings in granting dismissal of the Supervisors' challenge to the California unborn child regulation?

4. Whether dismissal of the Supervisors' challenge to then-pending federal and state court contempt proceedings was proper?

STATEMENT OF THE CASE

This petition represents, hopefully, the last round in petitioners' challenge to state and federal welfare programs. These challenges began on May 27, 1975, when the petitioners adopted Resolution Number 75-2727 declaring that Plumas County would no longer participate in any federal or state mandated social services programs. This first protest was halted after the issuance of an injunction against Plumas County in *Obledo v. Ross*, Plumas Super. Ct. No. 8562 (1975).

On July 28, 1975, a judgment was entered in *Cooper v. Obledo*, Sacto. Super. Ct. No. 219145 (1975). This judgment implemented the decisions of the California Supreme Court in *California Welfare Rights Organization v. Brian*, 11 Cal.3d 237, 520 P.2d 970 (1974), *cert. den.*, 419 U.S. 1022 (1974), and *Cooper v. Swoap*, 11 Cal.3d

856, 524 P.2d 97 (1974), *cert. den.*, 419 U.S. 1022 (1974). The State and its agent counties were ordered to return all monies unlawfully withheld pursuant to several invalid state regulations. On November 11, 1975, and again on November 18, 1975, petitioners adopted minute orders refusing to comply with the decision in *Cooper v. Obledo*. On February 6, 1976, the Superior Court of Sacramento County adjudicated the supervisors guilty of contempt and sentenced them each to $500 fines.

On January 6, 1976, the petitioners adopted minute orders refusing to comply with two other court decisions: *Wong v. Brian*, Sacto. Super. Ct. No. 203363 (1971), and *Yee-Litt v. Richardson*, 353 F.Supp. 996 (N.D. Cal. 1973), *aff'd without opinion sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973). The decision in *Wong v. Brian* required reimbursement of medicaid benefits that had been unlawfully withheld pursuant to invalid state regulations. The decision in *Yee-Litt v. Richardson* required continuation of welfare assistance to recipients who requested hearings until final decisions were rendered in their cases. On January 30, 1976, Chief Judge Oliver Carter adjudicated the petitioners herein guilty of contempt of the *Yee-Litt* order and sentenced them each to $100 fines for each day of further non-compliance.

Petitioners sought judicial review of the contempt adjudications in *Cooper* and *Yee-Litt*. Final judgments were rendered in both actions affirming the contempt judgments. *Ross v. Superior Court*, 19 Cal.3d 899, 569 P.2d 727 (1977); *Yee-Litt v. Richardson*, Unpublished Memorandum No. 76-1455 (9th Cir. Aug. 28, 1978). Neither of those decisions was appealed to this Court.

During the pendency of these actions, a welfare recipient in Plumas County initiated an action against the

State of California seeking the imposition of a receivership against the county. *Larsen v. Woods*, Sacto. Super. Ct. No. 259488 (February 17, 1976). On March 24, 1977, judgment was entered directing the State to initiate receivership proceedings against Plumas County. After a hearing pursuant to California Welfare and Institutions Code § 10605, the State notified the petitioners herein that administration of the county welfare programs would be taken over by the State. After the issuance of this notice, the county agreed to end its "secession" and to comply with state and federal mandates.

As discussed herein, no point raised in the petition for certiorari presents an issue justifying the exercise of this Court's jurisdiction. No important issues of federal law are presented by this petition since the District Court and Court of Appeals properly applied this Court's rulings on standing in the federal courts. Petitioners have not suffered any injury which could be redressed by a favorable decision herein since the availability of federal financial participation inures to the benefit of petitioners and their constituents. Moreover, no conflict exists among the circuits since no Court of Appeals has ever found standing under the circumstances of this case. The petition for certiorari should therefore be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE PLUMAS COUNTY BOARD OF SUPERVISORS HAS NO STANDING TO CHALLENGE FEDERAL FINANCIAL PARTICIPATION IN OPTIONAL STATE PAYMENTS FOR FAMILIES WITH UNBORN CHILDREN

A.

In Order To Establish Standing, Petitioners Must Demonstrate That They Have Suffered Some Injury Which Is Likely To Be Redressed by a Favorable Decision.

In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court summarized the rule for determining whether the petitioners herein had standing as follows:

> "In sum when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." 426 U.S. at 38.

Two showings must therefore be made by petitioners. First, they must demonstrate that they have suffered an injury. Second, they must demonstrate that this injury is likely to be redressed by a favorable decision.

B.

Petitioners Have an Independent Obligation Under State Law To Provide Aid to Families with Unborn Children.

In *California Welfare Rights Organization v. Brian,* 11 Cal.3d 237, 520 P.2d 970 (1974), the California Supreme Court considered the scope of the State AFDC program for unborn children. The Court first analyzed the provisions of the Social Security Act and concluded, as this Court ruled approximately one year later in *Burns v. Alcala,* 420 U.S. 575 (1975), that the unborn child program was optional with the states. *California Welfare Rights Organization v. Brian, supra,* 11 Cal.3d at 241.

Having decided that the unborn child program was optional, the California Supreme Court then had to determine if California had exercised its option. The Court noted the long-standing administrative interpretation and concluded that California had "elected to include unborn children in its AFDC plan." 11 Cal.3d at 241.

Petitioners contend, however, that the inclusion of unborn children under the California AFDC plan is dependent on the availability of federal financial participation. They argue that if federal financial participation were withdrawn, the state would exclude families with unborn children from its plan.

Petitioners' contention has already been made to and rejected by the California Supreme Court. In *Ross v. Superior Court,* 19 Cal.3d 899, 569 P.2d 727 (1977), the Supreme Court considered the propriety of a contempt sanction against the petitioners herein for violating the court order in *Cooper v. Obledo,* Sacto. Super. Ct. No. 219145 (1976). In *Ross,* the petitioners argued that the

availability of federal financial participation to families with unborn children was illegal in light of this Court's decision in *Burns v. Alcala* and that therefore the underlying court order was invalid.

The California Supreme Court expressly rejected that argument. The Court noted that, "[P]etitioners contend that the portion of the judgment implementing this court's unanimous decision in [*California Welfare Rights Organization v.*] *Brian* is erroneous under the subsequent United States Supreme Court decision in *Burns v. Alcala* (1975), 420 U.S. 575. . . . This contention is clearly erroneous on several grounds. . . . [O]ur *Brian* decision was explicitly based on our interpretation of California's statutory welfare scheme (see 11 Cal.3d at pp. 240–241 . . .), and thus is not affected by the Supreme Court's subsequent interpretation of federal legislation in *Burns.*" 19 Cal.3d at 909, n.7.

Petitioners' contention also ignores the many instances in which the California welfare programs extend beyond the availability of federal financial participation. In *Tripp v. Swoap,* 17 Cal.3d 671, 552 P.2d 749 (1976), the California Supreme Court expressly rejected the argument advanced by petitioners herein that the scope of the state AFDC program was conditioned on the availability of federal financial participation. *Tripp* was a petition for hearing from the denial of prejudgment interest to a welfare recipient who had successfully challenged an unfavorable administrative hearing decision.

One of the arguments advanced by the state in opposition to an award of prejudgment interest was that while the federal government funds a large share of the welfare payments made by the state, no federal statute authorized reimbursement to the state for interest payments. 17 Cal.3d at 684–685. This argument had been accepted

by a Court of Appeal in *Luna v. Carleson*, 45 Cal.App.3d 670 (1975).

The Supreme Court disapproved the *Luna* decision and noted that:

> "As amici have pointed out, however, *whether federal reimbursement is available is irrelevant* to the determination of the issue whether interest is recoverable against the state. *The claims of a recipient such as plaintiff are based upon an entitlement to benefits as a matter of state law.* (See *Bd. of Soc. Welfare v. County of L.A., supra*, 27 Cal.2d 81.)" *Tripp v. Swoap, supra*, 17 Cal.3d at 685, emphasis added.

The rule enunciated in *Tripp* has been consistently applied in California. The remedy for petitioners is therefore not to rely on Proposition 13 rhetoric in this Court (Petition at 14), but rather to seek a narrowing construction of state law in the California Supreme Court or in the State Legislature. That is an approach that they have chosen not to follow for obvious reasons.

C.

Since Petitioners Have an Independent Obligation Under State Law To Provide Benefits to Families with Unborn Children, Petitioners Have Not Suffered Any Financial Injury Since They Are Benefitted by the Availability of Federal Financial Participation.

The only financial injury put forward by plaintiffs to establish injury is that they have been forced to pay out tax monies in the form of AFDC payments to families with unborn children. Since petitioners cannot establish standing as federal or county taxpayers (see *Massachusetts v. Mellon*, 262 U.S. 447 (1923)), they must

demonstrate some financial injury as county administrators. That demonstration cannot be made.

Under California law, counties administer the AFDC program as agents of the State. *Ross v. Superior Court*, 19 Cal.3d 899, 569 P.2d 727, 731 (1977). Pursuant to section 403 of the Social Security Act, 42 U.S.C. § 603, federal financial participation is available to pay 50% of the cost of AFDC grants. In California, the remaining 50% of the cost of AFDC grants is divided between the State and each county. Pursuant to Welfare and Institutions Code § 15200(a), the State pays 67.5% of the non-federal share or 33.75% of the cost of AFDC grants. Each county is therefore left to pay 16.25% of the cost of its AFDC grants.

Where federal financial participation is unavailable, the non-federal share is equal to the entire cost of the AFDC grant. In such cases, the State pays 67.5% and each county pays 33.5% of its grant costs. Every county, including Plumas, is therefore substantially aided by the availability of federal financial participation since its share of the costs of grants is reduced from 33.5% to 16.25%.

Thus, if federal financial participation were not available, Plumas County would have to pay 33.5% of the grant costs for families with unborn children. Since federal financial participation *is* available, Plumas County pays only 16.25% of the grants costs for such families. Petitioners therefore have suffered no injury as a result of the availability of federal financial participation.

D.

The Claim That Petitioners Must Violate Their Oaths of Office as a Result of the Availability of Federal Financial Participation Does Not Present an Injury Likely To Be Redressed by a Favorable Decision Since Petitioners Will Be Required To Continue Assistance Under State Law.

Petitioners contend that a conflict exists between their oaths to support the laws of the United States and their duty to administer the AFDC program.[1] (Petition at 11.) Regardless of the availability of federal financial participation, the supervisors would be required to perform exactly the same acts under state law. The holding in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), relied on by petitioners, is therefore inapplicable.

In *Aguayo*, welfare recipients and city administrators challenged a state work program. The work program was alleged to be inconsistent with the Social Security Act. Therefore, a conflict existed between the officials' oaths to uphold state and federal law. That conflict could be eliminated by the termination of the challenged program.

In contrast, an order terminating federal financial participation for families with unborn children would not affect the petitioners' obligation to provide AFDC to families with unborn children. Petitioners acknowledge that California can establish an unborn child program with state funds. As indicated previously, California has established such an independent program. As a result,

[1] It is somewhat ironic that petitioners should contend that they are being forced to violate their oaths of office. Petitioners chose to violate these oaths when they refused to implement *any* federal or state mandated welfare programs, regardless of their legality.

state law establishing such a program creates no conflict for the county supervisors regarding their oaths of office. The only conflict that exists is between those oaths of office and the supervisors' notions of political expediency.

E.

Petitioners Have Not Suffered Any Injury To Be Redressed by a Favorable Decision Since the Contempt Proceedings Against Petitioners Were Based on Their Failure To Comply with State and Federal Court Orders.

The petitioners seem to contend that they have been injured as a result of the contempt proceedings initiated against them for failing to comply with state and federal court orders. (Petition at 10.) The adjudications of contempt would not be affected, however, by a termination of federal financial participation to families with unborn children. Petitioners therefore have no standing to challenge the legality of this practice.

The contempt proceeding in *Yee-Litt v. Richardson*, Unpublished Memorandum No. 76-1455 (9th Cir. Aug. 28, 1978), did not even relate to the provision of AFDC to families with unborn children. That case involved the provision of continuing assistance to AFDC recipients who were threatened with a termination, reduction, or withholding of assistance. *Yee-Litt v. Richardson*, 353 F.Supp. 996 (N.D. Cal. 1973), *aff'd without opinion sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973). Thus, no injury relating to that action would be redressed by a favorable decision herein.

Similarly, the contempt proceeding in *Ross v. Superior Court*, 19 Cal.3d 899, 569 P.2d 727 (1977), related to

the failure of the supervisors to obey a valid California state court order. Regardless of the legality of federal financial participation in AFDC payments to families with unborn children, the petitioners herein were required to obey that court order and challenge it directly in the courts, if they wished. As noted by the California Supreme Court, even if the underlying order were erroneous, such an error constitutes no defense to a contempt conviction so long as the court had jurisdiction to issue the order." *Ross v. Superior Court*, 19 Cal.3d at 909, n.7, 569 P.2d at 733, n.7. That rule, of course, is consonant with the decisions of this Court as well. See, for example, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

F.

Even if the Interpretation of California Law Were Uncertain the District Court Would Have Been Required To Abstain in Order To Allow a Definitive Construction of the State Statutes in the State Courts.

As discussed in the foregoing sections, California law would require payment of AFDC to families with unborn children even if federal financial participation were unavailable. Petitioners therefore have suffered no remediable injury and have no standing to maintain this action.

If this Court has any doubt as to the independent nature of the obligation imposed by California law on petitioners, it should still refuse to disturb the refusal of the trial court to exercise its jurisdiction. Petitioners should be required to file an action for declaratory relief in state court to construe Welfare and Institutions Code §§ 11202 and 11250.

This course of action is available to petitioners since their challenge to the state regulations was dismissed without prejudice to the initiation of an action in state court. This course would properly give to the sovereign State of California the opportunity to construe its own statutes. Assuming that respondents' construction will be adopted by the state courts, abstention also furthers the ends of judicial economy by obviating the need for judicial resolution of the federal question before this Court.

Under the abstention doctrine, a federal court with jurisdiction should still refuse to rule on a federal claim where a definitive interpretation of the challenged state statute or regulation in the state courts might avoid in whole or in part the necessity for federal adjudication. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In the *Pullman* case this Court explained that in the interests of federalism, state courts should be given the first opportunity to interpret their own statutes. *Id.*, at 501. See also, *Bellotti v. Baird*, 428 U.S. 132 (1976).

By staying its hand in this matter, the trial court furthered the fundamental policy concerns embodied in the abstention doctrine. As California's longstanding practice of providing AFDC to families with unborn children demonstrates, important issues of state policy are presented by this case. Not only would the state courts be provided the prior opportunity to construe the statutes authorizing this aid, but such a state court construction might also avoid the necessity for federal court intervention.

Petitioners contend that state regulations requiring aid to the unborn are unauthorized by state law and are contrary to the Social Security Act. As discussed in the

previous sections, state regulations requiring payment of AFDC to families with unborn children are required by Welfare and Institutions Code §§ 11202 and 11250. Moreover, state law can and frequently does provide benefits to individuals ineligible for federal financial participation. Such aid is not contrary to the Social Security Act since the Act does not govern state programs funded without federal financial participation.

Thus, if this Court believes that state law is unclear, the California courts should be given the opportunity to interpret sections 11202 and 11250 to impose an independent state obligation to provide AFDC for unborn children. Such an interpretation would obviate the need to adjudicate the federal question.

II.

THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE MAY AUTHORIZE FEDERAL FINANCIAL PARTICIPATION TO STATES WISHING TO PROVIDE AFDC TO FAMILIES WITH UNBORN CHILDREN

The trial court dismissed petitioners' first cause of action on grounds of standing, rather than for failure to state a claim upon which relief could be granted. Only the second cause of action, challenging the *state* regulations, was dismissed for failure to state a claim. The merits of petitioners' challenge to the federal unborn child regulations are therefore not properly before this court. Since petitioners have argued this issue as their initial point, however, respondents will briefly discuss the invalidity of petitioners' contention.

A.

No Conflict Exists Among the Circuits on This Issue.

Petitioners argue that there is a conflict among the circuits regarding the legality of federal financial participation in AFDC payments to families with unborn children. (Petition at 9.) Two of the three decisions relied on by petitioners as establishing the illegality of this practice were either reversed or vacated by this Court. *Alcala v. Burns*, 494 F.2d 743, 746 (8th Cir. 1974), *rev'd*, 420 U.S. 575 (1975); *Parks v. Harden*, 504 F.2d 861, 872 (5th Cir. 1974), *vacated*, 421 U.S. 926 (1975). The remaining decision, *Wisdom v. Norton*, 507 F.2d 750 (2d Cir. 1974) requires somewhat greater discussion.

In *Wisdom*, the Court of Appeals for the Second Circuit concluded in dictum that the Secretary had no authority to authorize federal financial participation for families with unborn children. 507 F.2d at 756. That case hardly presents a decision on the merits of the legality of the Secretary's practice, however. The Secretary was not a party to that action and was not even invited to file a brief expressing his views. In addition, both parties to that action agreed that the optional program was illegal. 507 F.2d at 756; Opinion on petition for rehearing, at 2.

Similarly, the Court of Appeals for the Ninth Circuit has never concluded that the Secretary's practice was legal. Rather, the Court only determined that the petitioners herein did not have standing to challenge the practice. Thus, no conflict exists among the circuits.

B.

The Secretary Has the Authority To Make Federal Financial Participation Available To Meet the Needs of Unborn Children Under 42 U.S.C. § 1302.

In *Burns v. Alcala*, this Court explained that, "We have no occasion to decide . . . whether 42 U.S.C. § 1302 authorizes HEW to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards." 420 U.S. at 586. 42 U.S.C. § 1302 does provide such authorization since federal financial participation in AFDC payments to families with unborn children is consistent with the program and necessary for its efficient administration.

Federal financial participation in grants for unborn children is just one of a number of optional AFDC programs. These optional programs provide federal financial participation in payments made to individuals in the process of gaining or losing eligibility for the AFDC program. See, *Burns v. Alcala, supra,* 420 U.S. at 584-585. In all of these programs, the effect of granting aid is to provide money necessary during a transition period in order to minimize dependence later.[2]

[2]The authority of the Secretary of HEW to grant such assistance, including aid for the unborn, is discussed at length in Note, "HEW's Power To Grant AFDC Benefits to Technically Ineligible Individuals," 124 U. Penn. L. Rev. 1359 (1976). That note concludes, "HEW has the power under section 1102 of the [Social Security] Act to authorize payments on behalf of . . . persons who temporarily do not meet the technical eligibility criteria of the Act when assistance is substantially related to those persons' needs arising at the time of technical eligibility." *Id.* at 1383. See also *Parks v. Harden*, 504 F.2d 861, 875-877 (5th Cir. 1974) (Ainsworth, J., dissenting).

45 C.F.R. § 233.90(c)(2)(i), for example, provides federal financial participation in payments made to a relative before the child goes to live with the relative. Pursuant to 45 C.F.R. § 233.90(c)(2)(iii), federal financial participation is available in payments made to a relative where the child has already left the home of the relative. Under 45 C.F.R. § 233.90(c)(2)(iv), federal financial participation is available in payments made to a non-relative who is caring for a child in an emergency situation. In each of these transition situations, the federal government helps meet increased short term needs.

Pregnant women also need additional funds to meet their increased nutritional needs and to prepare the home for the arrival of the child. Additional AFDC benefits can help buy a crib, baby clothes, diapers, and help meet the myriad other expenses associated with a newborn child. The regular AFDC grant is insufficient to meet these basic needs since grant levels are established without taking such needs into consideration. Welfare and Institutions Code §11452. In addition, in California, as in most other states, grant levels are established at less than the minimum need levels. *Compare,* for example, Welfare and Institutions Code §11450 with §11452.

Pregnant women are also in need of medical care, including prenatal care and maternity services. While Title V of the Social Security Act, 42 U.S.C. §§ 701-708, provides assistance for some prenatal and postnatal services, especially for high risk infants, it is not available to meet the basic health care needs of pregnant women and their unborn children.

The program that is designed to meet these needs is the Medicaid program. 42 U.S.C. §§ 1396 *et seq.* The Medicaid program limits eligibility, however, to those

families who are eligible for AFDC or who would be eligible but for excess income or resources. 42 U.S.C. § 1396a(a)(10). With this in mind, the Secretary could reasonably conclude that the need to insure adequate health care for women and newborn children requires the provision of AFDC eligibility during this transition period.

III.

NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS IMPROPERLY RELIED ON MATTERS OUTSIDE THE PLEADINGS IN GRANTING DISMISSAL OF THE PETITIONERS' CHALLENGE TO THE STATE REGULATION

Petitioners contend that the District Court and the Court of Appeals improperly relied on the "Horel Affidavit" in construing Welfare and Institutions Code § 11450. (Petition at 13.) They contend that this reliance somehow violated Federal Rules of Civil Procedure Rule 12(b).

Nothing in this rule prevents the consideration of matters outside of the pleading. The rule simply provides that if such matters have been presented and not excluded, the motion must be treated as one for summary judgment.

Petitioners do not contend that they attempted to exclude the "Horel Affidavit" from consideration by the Court. Neither do they contend that they were not given a reasonable opportunity to present all material made pertinent by its introduction.

Finally, there is no indication that the Court of Appeals even considered the "Horel Affidavit" in reaching its decision. The purpose supposedly served by the Affidavit was to construe California law as to the independent nature of the state obligation to provide AFDC to families with unborn children. Any uncertainty on that point was resolved by the decision of the California Supreme Court in *Ross v. Superior Court.*

This argument, which was presented neither to the District Court nor the Court of Appeals, should therefore be rejected.

IV.

THE PETITIONERS' CHALLENGE TO THE THEN-PENDING FEDERAL AND STATE COURT CONTEMPT PROCEEDINGS WAS PROPERLY DISMISSED

It is somewhat hard to understand why this point was raised in the petition for certiorari. As noted in the decision of the Court of Appeals, "Final judgment has now been rendered in those actions affirming the contempt judgments. . . . Thus, this claim of appellants has already been adjudicated and is now precluded by res judicata." *Plumas County Board of Supervisors v. Califano,* 594 F.2d 756, 758, n.2. Petitioners do not contend that any other actions are presently outstanding or that there is any active case or controversy to resolve.

More fundamentally, the District Court and Court of Appeals properly concluded that *Younger* abstention was appropriate under the circumstances of the case. As noted by this Court recently in *Moore v. Sims,* ___ U.S. ___, 47 U.S.L.W. 4693, 4696 (1979), "The pertinent issue is whether appellees' constitutional claims could have been raised in pending state proceedings."

Nothing prevented the petitioners herein from raising all appropriate claims in the state court proceeding. In fact, the California Supreme Court expressly considered and rejected the claim by petitioners that the underlying

injunction enforced in *Ross v. Superior Court* was invalid. 19 Cal.3d at 909, n.7. Petitioners chose not to appeal that decision to this Court.

Moreover, petitioners have never cited any authority for the proposition that the District Court had the authority to enjoin the pending federal contempt proceeding in *Yee-Litt v. Richardson.* They have never demonstrated any reasons why their bad faith claims could not have been presented in that action or that any defenses they might have had were barred from presentation. Again, petitioners chose not to appeal that decision to this Court.

Under this Court's decision in *Judice v. Vail,* 430 U.S. 327 (1977), it is difficult to understand how the District Court could have done anything but abstain. In *Juidice,* this Court reversed the decision of a district court which had enjoined enforcement of New York contempt procedures. This Court emphasized that:

> "[P]rinciples [of comity] apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it is surely an important interest. . . . [I]t is of sufficiently great import as to require application of the principles of those cases [*Younger v. Harris,* 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975)]." *Id.,* at 335.

In the instant case, petitioners similarly contend that the contempt procedures violated their due process rights. Petitioners had an opportunity to advance those claims in the respective state and federal forums. Those claims were advanced and rejected. No review was sought

from this Court. This Court should therefore also refuse to review petitioners' claims in this action.

CONCLUSION

For the foregoing reasons, respondents urge that the Petition for Certiorari be denied.

Respectfully submitted,

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Dated: July 30, 1979
Washington, D.C.

APPENDIX

APPENDIX

CALIFORNIA WELFARE AND INSTITUTIONS CODE

§ 11202. Needy child

As used in this chapter, the term "needy child" means a child living in a family as described in Section 11250, or a child as described in Section 11251.

CALIFORNIA WELFARE AND INSTITUTIONS CODE

§ 11250. Families

Aid, services, or both, shall be granted under the provisions of this chapter, and subject to the regulations of the department, to families with related children under the age of 18 years, except as provided in Section 11253, in need thereof because they have been deprived of parental support or care due to:

(a) The death, physical or mental incapacity, or incarceration of a parent; or

(b) The divorce, separation or desertion of a parent or parents and resultant continued absence of a parent from the home for these or other reasons; or

(c) The unemployment of a parent or parents.

§ 11452. Minimum basic standards of adequate care

Minimum basic standards of adequate care shall be distributed to the counties and shall be binding upon them. Such standards are hereby determined on the basis of the schedule set forth in this section, as adjusted for cost-of-living increases or decreases pursuant to Section 11453, which schedule is designed to insure:

(1) Safe, healthful housing.

(2) Minimum clothing for health and decency.

(3) Low-cost adequate food budget meeting recommended dietary allowances of the National Research Council.

(4) Utilities.

(5) Other items including household operation, education and incidentals, recreation, personal needs, and insurance.

(6) Allowance for essential medical, dental, or other remedial care to the extent not otherwise provided at public expense.

The schedule of minimum basic standards of adequate care is as follows:

Number of needy persons in the same family	Minimum basic standards of adequate care
1	168
2	282
3	343
4	422
5	487
6	549
7	604
8	667
9	730
10	794

plus seven dollars ($7) for each additional needy person.

The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this section.

CALIFORNIA WELFARE AND INSTITUTIONS CODE

§ 15200. Needy children

There is hereby appropriated out of any money in the State Treasury not otherwise appropriated, and after deducting federal funds available, the following sums:

(a) To each county for the support and maintenance of needy children, 67.5 percent of the sums specified in Section 11450.

45 C.F.R. § 233.90(c)(2)(i)

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC.

45 C.F.R. § 233.90(c)(2)(iii)

(2) Federal financial participation is available in:

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC, and

45 C.F.R. § 233.90(c)(2)(iv)

(2) Federal financial participation is available in:

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency

situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

No. 79-9

In the Supreme Court of the United States

OCTOBER TERM, 1978

PLUMAS COUNTY BOARD OF SUPERVISORS, ET AL.,
PETITIONERS

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 594 F. 2d 756. The opinion of the district court (Pet. App. B-1 to B-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1979. The petition for a writ of certiorari was filed on July 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state regulation providing for welfare payments on behalf of unborn children violates Title IV(A) of the Social Security Act, 42 U.S.C. 601 *et seq.*

2. Whether petitioners have standing to challenge a federal regulation providing for federal financial participation in state payments for unborn children under the Aid to Families with Dependent Children program.

3. Whether the district court erred in refusing to interfere in contempt proceedings against petitioners.

STATEMENT

In *Burns* v. *Alcala*, 420 U.S. 575 (1975), this Court held that states receiving federal financial assistance under the Aid to Families with Dependent Children (AFDC) program are not required to offer welfare benefits to pregnant women for their unborn children. Nonetheless, since 1949, California has voluntarily included unborn children within the coverage of its AFDC plan (Pet. App. A-5, C-8). Regulations of the Department of Health, Education, and Welfare provide that, when states offer such payments to needy pregnant women as part of an approved AFDC plan, matching federal grants will be made available (*id.* at A-3, C-8). See 45 C.F.R. 233.90(c)(2)(ii). California's plan has been approved by the Secretary (Pet. App. A-3), and the State therefore receives matching federal funds under the AFDC subchapter of the Social Security Act, 42 U.S.C. 601 *et seq.*[1]

[1]The basic features of the AFDC program are described in *King* v. *Smith*, 392 U.S. 309, 316-317 (1968) (see Pet. App. A-2). The California plan is "county administered and state supervised, with the counties acting as agents for the state in making the prescribed payments" (Pet. App. A-3). The federal government pays 50% of the cost of AFDC grants, the State pays 33.75%, and the county the remaining 16.25% (*ibid.*).

In February 1976, petitioners, the governing body of a California county and its individual members, filed this suit in the United States District Court for the Eastern District of California. They argued that the regulation of the California Department of Benefit Payments establishing the eligibility of unborn children for AFDC grants and the HEW regulation permitting federal financial participation in state payments for unborn children violate Section 406(a) of the Social Security Act, 42 U.S.C. 606(a). Petitioners sought to enjoin respondent state officials from requiring AFDC payments on behalf of unborn children. They also sought to enjoin the Secretary from providing federal funds for such payments and from approving state plans that make unborn children eligible to receive AFDC grants.

The district court dismissed petitioners' challenge to the California regulation for failure to state a claim on which relief could be granted (Pet. App. B-5 to B-11). The court observed that, under the California Supreme Court's decision in *California Welfare Rights Organization* v. *Brian*, 11 Cal. 3d 237, 520 P. 2d 970, 113 Cal. Rptr. 154, cert. denied, 419 U.S. 1022 (1974), the State's obligation to make welfare payments to pregnant needy women is independent of the availability of federal funds to share the cost of such payments. And, the court noted (Pet. App. B-6), petitioners "do not deny that the State of California could adopt a program of aid to pregnant needy women, independent of the Federal AFDC program." Accordingly, the court held that petitioners could not obtain relief on the ground that the California regulation is inconsistent with the Social Security Act.

The district court also ruled that petitioners lack standing to challenge the Secretary's regulation authorizing federal financial participation in state payments for

unborn children. Because petitioners' "obligation to pay welfare would continue in effect under State law even if the federal regulation became for any reason inoperative" (Pet. App. B-11), the court found that petitioners suffered no injury by virtue of the availability of federal funds. Relying on *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), that court concluded that any injury petitioners might suffer in their capacity as federal taxpayers was insufficient to confer standing to attack the regulation.

The court of appeals affirmed (Pet. App. A-1 to A-9). The court first observed (*id.* at A-5) that a few months after the district court's decision, the California Supreme Court, in *Ross* v. *Superior Court*, 19 Cal. 3d 899, 569 P. 2d 727, 141 Cal. Rptr. 133 (1977), reiterated its view that California's obligation to make welfare payments to needy pregnant women is derived solely from the State's statutory welfare scheme and therefore is unaffected by this Court's interpretation of federal law in *Burns* v. *Alcala*, *supra*. Accordingly, the court of appeals held that the California regulation providing for AFDC payments on behalf of unborn children does not violate the Social Security Act. Citing three decisions of this Court,[2] the court of appeals declared that a state AFDC plan is in conflict with the Act only "when it does not incorporate the *minimum* requirements of 42 U.S.C. §602" (Pet. App. A-6).

The court of appeals also sustained the district court's ruling that petitioners lack standing to challenge the Secretary's regulation offering federal financial participation in state payments for unborn children. Because California law requires such payments irrespective of

[2] *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968).

federal financial assistance, the court of appeals agreed with the district court's conclusion that petitioners "cannot claim to be aggrieved" by the disputed regulation (Pet. App. A-8).

ARGUMENT

The decision of the court of appeals is correct and does not warrant further review.

1. As petitioners apparently agree (see Pet. App. B-6), the relevant Social Security Act provision (42 U.S.C. 602) imposes only minimum requirements for state AFDC plans. To the extent it is pertinent here, Section 406(a) of the Act, 42 U.S.C. 606(a), simply identifies the "dependent children" who *must* be assisted if a state elects to participate in the AFDC program. If a state not only meets those requirements but also chooses to make AFDC benefits available to persons other than the ones receiving mandatory payments, federal law is not violated. In *Brian* and *Ross*, the California Supreme Court has held that the State's regulation providing for AFDC payments on behalf of unborn children is not dependent on federal financial participation in such payments.[3]

[3] As the courts below held (Pet. App. A-6, B-8 to B-9), petitioners' reliance on Cal. Welf. & Inst. Code § 11450 (West Supp. 1979) in this connection is misplaced. That provision does not mean that California will not make payments for unborn children if federal support for such payments is eliminated. Section 11450 applies only to the situation in which the total federal AFDC contribution is computed by adding together the federal share of the welfare benefits paid to each individual recipient. Since 1965, California has not employed this method of calculating the amount of federal aid to be paid to the State under the AFDC program. Rather, the State now computes the federal contribution according to the aggregate method authorized by 42 U.S.C. 1318. Under this scheme, the federal government simply pays 50% of the State's total cost in administering its AFDC plan. In light of this development, the court of appeals correctly concluded that "the federal and county dollar-per-person figures set forth in § 11450 no longer have significance" (Pet. App. A-6).

Petitioners' argument that the regulation is inconsistent with federal law therefore must fail. The state regulation would remain unchanged, even if the Secretary's regulation making federal funds available for payments to needy pregnant women were invalidated.

Petitioners nonetheless contend (Pet. 13-15) that the district court erred in dismissing their challenge to the California regulation for failure to state a claim on which relief could be granted. They assert that, in reaching its decision, the court considered materials outside the pleadings and therefore should have treated the Secretary's motion to dismiss as a motion for summary judgment. But petitioners do not divulge how they would have been helped if the district court had followed this preferred course. The Secretary moved in the alternative for summary judgment (Pet. App. B-3), and petitioners do not suggest that they were prevented from introducing any relevant materials on the question of the interdependence of the state and federal regulations. Moreover, the affidavits that the district court allegedly improperly considered could hardly have had the importance petitioners attribute to them, in light of the California Supreme Court's decisions in *Brian* and *Ross*. Those decisions, not the affidavits of a state welfare department official, establish that the State's obligation to provide benefits to needy pregnant women is independent of the availability of federal funds to share the cost of such payments. At most, the affidavits were significant because they informed the court of California's method of computing the federal contribution to the cost of the State's AFDC payments (see note 3, *supra*). Petitioners did not and do not assert that the affidavits inaccurately described the administration of the California AFDC plan.

2. In view of the independence of the California regulation, the district court and the court of appeals

correctly concluded that petitioners lack standing to challenge the Secretary's decision to permit federal financial participation in the State's AFDC payments on behalf of unborn children. Petitioners are not aggrieved by the federal government's contribution to such payments and they would not benefit if the federal contribution were terminated. Indeed, in the latter event, California counties would simply be required to bear twice their current financial burden in connection with the welfare benefits petitioners oppose. Under these circumstances, the courts below properly ruled that petitioners did not show any injury "that is likely to be redressed by a favorable decision" and therefore lack standing to attack the Secretary's regulation. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).[4]

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[4]Because the lower courts found that petitioners lack standing to challenge the Secretary's regulation, they did not rule on the validity of the Secretary's authorization of federal financial participation in voluntary state AFDC payments to needy pregnant women. In *Burns* v. *Alcala*, *supra*, 420 U.S. at 586, this Court explicitly reserved the questions "whether HEW has statutory authority to approve federal participation in state programs ancillary to those expressly provided in the Social Security Act * * *, or whether 42 U.S.C. §1302 authorizes HEW to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards." Petitioners stress (Pet. 8-9) that three courts of appeals have expressed disapproval of the Secretary's practice of assisting state payments for unborn children. See *Wisdom* v. *Norton*, 507 F. 2d 750, 756 (2d Cir. 1974); *Parks* v. *Harden*, 504 F. 2d 861, 872 (5th Cir. 1974), vacated, 421 U.S. 926 (1975); *Alcala* v. *Burns*, 494 F. 2d 743, 746 (8th Cir. 1974), rev'd, 420 U.S. 575 (1975). But each of the statements cited by petitioners is dictum in a court of appeals' opinion addressing the question that this Court answered in *Burns*, *i.e.*, whether a state AFDC plan *must* provide for payments for unborn children. And, as the courts below held, petitioners are not the proper parties to litigate the validity of the Secretary's regulation offering financial help to states that voluntarily make such payments. For this reason, this case does not present an appropriate occasion for the Court to resolve the issues left open in *Burns*.

3. Petitioners also maintain (Pet. 15-17) that the district court erred in deciding not to interfere with pending state and federal contempt proceedings arising out of petitioners' refusal to pay needy pregnant women the welfare benefits mandated by state law.

The district court correctly ruled (Pet. App. B-12), however, that petitioners had an adequate opportunity to raise their federal constitutional defenses in the contempt proceedings and, accordingly, were not entitled to equitable relief. In such a situation, principles of comity require that federal courts not intrude into the contempt process of a state's judicial system. *Juidice* v. *Vail*, 430 U.S. 327 (1977). See also *Moore* v. *Sims*, No. 78-6 (June 11, 1979). Moreover, as the court of appeals noted (Pet. App. A-4 n.2), both the federal and state contempt actions have now proceeded to final judgment. Petitioners have not sought review of those judgments in this Court, and they cannot use the present case to relitigate matters already resolved against them in other proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

DOJ-1979-08

Supreme Court, U. S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN, JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,
Petitioners,

VS.

PATRICIA R. HARRIS, Secretary of the United States Department of Health, Education and Welfare; MARIO OBLEDO, Secretary, Health and Welfare Agency, State of California; MARION J. WOODS, Director, Department of Benefit Payments, State of California; LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT, as parties to Cooper, et al. v. Obledo, et al.; JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER, BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to Yee-Litt, et al. v. Richardson, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-9

PLUMAS COUNTY BOARD OF SUPERVISORS and
SUPERVISORS LARRY DEAN, RUSSELL PAPENHAUSEN,
JOE W. CRIVELLO, OLE OLSEN, and LEONARD ROSS,
Petitioners,

VS.

PATRICIA R. HARRIS, Secretary of the
United States Department of Health, Education and Welfare;
MARIO OBLEDO, Secretary, Health and Welfare Agency,
State of California; MARION J. WOODS, Director,
Department of Benefit Payments, State of California;
LAURA COOPER, HAZEL WILKS, and OTTILIA LOTT,
as parties to Cooper, et al. v. Obledo, et al.;
JOYCE YEE-LITT, THEODORE PARSONS, LENA OLIVIER,
BEVERLY O'CAMPO, and RUBEN O'CAMPO, as parties to
Yee-Litt, et al. v. Richardson, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

Petitioners Plumas County Board of Supervisors, *et al.* (Supervisors), file this reply brief to correct several misstatements of fact and law made by respondents in their briefs in opposition to the petition for certiorari.

ARGUMENT

I

NEITHER THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE NOR STATES MAY EXPAND AID TO FAMILIES WITH DEPENDENT CHILDREN ELIGIBILITY TO INELIGIBLE CATEGORIES

In their petition for certiorari, the Supervisors challenged the authority of the Secretary of the Department of Health, Education, and Welfare (HEW) to authorize states to provide optional Aid to Families with Dependent Children (AFDC) to categories not included within the Social Security Act's definition of "dependent child." 42 U.S.C. § 606(a). HEW's response to this charge of expanding AFDC eligibility to categories not intended to be included by Congress is to provide for further expansion of eligibility. HEW declares:

> "Section 406(a) of the Act, 42 U.S.C. 606(a), simply identifies the 'dependent children' who *must* be assisted if a state elects to participate in the AFDC program. If a state not only meets those requirments but also chooses to make AFDC benefits available to persons other than the ones receiving mandatory payments, federal law is not violated." Brief for the Federal Respondent in Opposition (HEW Opposition) at 5 (emphasis in original).

Thus, in addition to its position that HEW itself may select legislatively excluded categories and extend eligibility, HEW now says that the states may similarly expand the categories of AFDC eligibles. In California, unborn children are not mentioned in the state AFDC statutes but rather are made eligible through the administrative regulation of the State Welfare Department, EAS 44-213.31. The result of HEW's position is to grant burgeoning state welfare bureaucracies a license for further expansion by creating new categories on which to expend federal, state, and local tax monies, unrestrained by statutory limitations. It is this all too typical bureaucratic disregard of legislative limitations which has fueled the present inflationary crisis. HEW's position, therefore, reemphasizes the necessity that this Court review the question of administrative expansion of statutory categories of welfare eligibility.

II

INVALIDATION OF THE HEW REGULATION WOULD NOT INCREASE COUNTY COSTS BUT WOULD RESOLVE THE CONFLICT WITH THE SUPERVISORS' OATHS

In support of its challenge to the Supervisors' standing to challenge HEW's expansion of AFDC eligibility, HEW claims the Supervisors are not aggrieved in that if federal financial participation in the unborn child program were ended, California counties would simply have to bear twice their current financial burden for this program. HEW Opposition at 7. HEW further notes that the state unborn child regulations would remain unchanged even if the HEW unborn child regulation were invalidated. Both these statements are incorrect. The state regulation, EAS 44-213.31 (Petition for Certiorari at C-8), which makes unborn children eligible for aid does so by including the unborn child within the definition of children eligible for the federal AFDC program. If federal eligibility for the unborn were revoked, California would have to amend EAS 44-213.31 by

deleting unborn children from the definition of those eligible for the federal AFDC program.

Of course, as respondents argue, California could then determine to commence a new program, outside of AFDC, to fund unborn children. But under state law, such a program could not require the expenditure of county funds.

Section 2231(a) of the California Revenue and Taxation Code provides in pertinent part:

> "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207."

Section 2207 of the Revenue and Taxation Code in turn provides:

> "§ 2207. Costs mandated by the state, local agency
> " 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following:
>
> "(a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program;
>
> "(b) Any executive order issued after January 1, 1973, which mandates a new program;
>
> "(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973."

Since a non-AFDC program for aid to unborn children would be a new program, implemented either by statute or executive order, the state would be required to reimburse

the counties, including Plumas County, for all costs required by the program. Thus, respondents' rationale that county costs would increase is in error; rather, costs to the county would have to be reimbursed by the state.

While HEW concentrated on the fiscal implications, it was unable to deal with the personal implications of the case to the Supervisors through the issue of violating their oath to uphold the laws and Constitution of the United States. Petition for Certiorari at 9-12. The Cooper, Wilks, and Lott respondents (Cooper respondents), however, attempt to rebut by stating that an order terminating federal financial participation for unborn children would not affect the Supervisors' obligation to provide AFDC to unborn children. Respondents' Brief in Opposition to Petition for Certiorari (Cooper Opposition) at 10. This statement is patently wrong. As the Cooper respondents note, California can establish an unborn child program with state funds. *Id.* What the Cooper respondents overlook is that such a program would not be AFDC which is established and governed by the Social Security Act. If the unborn child program were one strictly of state law, then there would be no issue of violating the oath to uphold the Federal Constitution and laws.

III

THE RULE 12(b) VIOLATION WAS FULLY PRESENTED TO THE LOWER COURTS

The Cooper respondents' opposition demonstrates an appalling lack of familiarity with this case. This is typified by their response to the Supervisors' argument that the lower courts' failure to exclude a certain affidavit in grant-

ing dismissal for failure to state a claim upon which relief may be granted violated Federal Rule of Civil Procedure 12(b). The Cooper respondents state that this issue was not presented either to the District Court or the Court of Appeals and should therefore be rejected. Cooper Opposition at 9. This statement is false. The Rule 12(b) error was specifically called to the District Court's attention in the Supervisor's Statement of Objections to Defendants' Proposed Findings and Judgment Dismissing Action. Record at 678. The District Court nonetheless adopted those findings and the judgment with minor pen and ink modifications. On appeal, the Supervisors devoted an entire section of their opening brief argument to the Rule 12(b) violation. Appellant's Opening Brief, Section III at 36-40. Since the most cursory examination of the record would have revealed these facts, the Supervisors believe that the Cooper respondents' statement that the issue was not presented to the lower courts demonstrates a woeful ignorance of this case.

The importance of the affidavit at issue lies in the fact that it directly contradicted the plain language of the statute and caused the lower courts to disregard that language which demonstrated the dependence of the California AFDC plan on federal financial participation. Respondents claim that the independence of the California welfare system was established by *Ross v. Superior Court,* 19 Cal.3d 899 (1977), and *California Welfare Rights Organization v. Brian,* 11 Cal.3d 237 (1974). HEW Opposition at 6; Cooper Opposition at 19. Respondents, however, cite no particular passage or even page in *Ross* or *Brian* for this proposition. The fact is that neither case pro-

claimed the alleged declaration of welfare independence. *Ross* merely cites *Brian,* noting that that decision was based on an interpretation of California's statutory welfare scheme (citing *Brian,* 11 Cal.3d at 240-41) and thus was not affected by this Court's decision in *Burns v. Alcala,* 420 U.S. 575 (1975). *Ross,* 19 Cal.3d at 909 n.7. The reason that *Ross* found that *Burns* did not affect *Brian* is that *Brian* merely notes that the HEW regulation permits but does not require states to include unborn children in their AFDC plan and California has elected to include unborn children in its AFDC plan. *Brian,* 11 Cal.3d at 240-41. This Court's decision in *Burns* that states are not required to include unborn children in AFDC, but reserving the question whether states are permitted to include them, thus did not affect the *Brian* analysis of the California program and this is what *Ross* is saying.

Thus, the key factor, in the District Court and Court of Appeals finding that the California welfare system is independent of the federal system and, therefore, would commence a new state financial unborn child benefit program, was the Horel affidavit. As the Supervisors pointed out to the Court of Appeals, citing *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 357 n.4 (1959), the effect of the Rule 12(b) error was to convert the motion to dismiss to a summary judgment motion and the Court of Appeals should therefore have considered the issue of the validity of the California unborn child regulation on its merits. Appellants' Opening Brief at 38-40. Similarly, this Court has jurisdiction to consider on its merits the issue whether the California unborn child regulation is viable and independent of federal financial participation.

CONCLUSION

The importance of this case extends far beyond the technical issue of whether unborn children may be paid AFDC benefits. The key issue is whether important governmental policies should be established by the public's elected representatives or by a faceless bureaucracy. The lower court decisions have elevated the welfare bureaucracy to a position in which it may not only override eligibility limitations established by Congress, but may immunize itself from challenge to the legality of these practices by the elected local officials who administer welfare. It is vital to the public interest that the increasing bureaucratic usurpation of legislative power be checked and that major policy decisions be restored to those officials who are directly responsible to the electorate. For this reason and for the reasons set forth in the Petition for a Writ of Certiorari, the Supervisors urge that certiorari be granted.

Respectfully submitted,

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September, 1979